Madras High Court Reports.

REPORTS OF CASES

DECIDED IN THE

HIGH COURT OF MADRAS

IN

1864 AND 1865.

BY

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AND
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SIR COLLEY HARMAN SCOTLAND, *Kt.*, *Chief Justice.*

Sir ADAM BITTLESTON, *Kt.*,
Hon. HENRY DOMINIC PHILLIPS,
Hon. HATLEY FRERE,
Hon. WILLIAM HOLLOWAY,
Hon. LEWIS CHARLES INNES,
} *Puisne Judges.*

Hon. JOHN BRUCE NORTON, *Advocate General.*

MEMORANDA.

ON the 16th December 1864, the Hon. H. D. PHILLIPS, resigned.

On the 16th December 1864, L. C. INNES, ESQ., Civil and Session Judge of Ootacamund, entered upon his duties as Acting Puisne Judge.

On the 8th April 1865, the Hon. L. C. INNES entered upon his duties as Puisne Judge.

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ERRATA.

Page 382 note (*a*), for 'Frere and Holloway, J. J.,' read 'Holloway and Innes, J. J.'

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CORRIGENDA.

Page 19, line 14, *for* 'reversing' *read* 'modifying.'
„ 61, note line 2 *dele* the point after 'bhavet;' line 3 *for* 'dravijam' *read* 'dravyam' *for* 'yâh' *read* 'yah.'
„ 77, line 17, *for* 'Jimûta' *read* 'Jimûta.'
„ 85, note (*a*) *after* 'p' *insert* '79' note (*c*) *for* '50' *read* '507.'
„ 87, lines 25 and 26, *dele* 'decided upon statute 3 and 4 W. 4. C. 42 sec. 5.'
„ 104, line 2, *for* 'charter' *read* 'charterer.'
„ 144, line 10, *after* 'however' *insert a comma.*
„ 178, line 2 from bottom, *for* 'Esdivile' *read* 'Esdaile.'
„ „ note (*c*), *for* '2' *read* '1.'
„ 179, line 22, *for* 'principle' *read* 'principles.'
„ 191, note (*b*), *for* 'E' *read* 'S.'
„ 192, line 23, *for* 'every' *read* 'very.'
„ 196, line 24, *for* 'appellants' *read* 'respondents.'
„ 200, line 20, *for* 'are' *read* 'is.'
„ 204, line 22, *for* 'evidence' *read* 'existence.'
„ 215, line 19, *for* 'Madras' *read* 'Madura.'
„ 220, line 19, *for* 'that founder of the kingdom' *read* 'the founder of that kingdom.'
„ 230, line 18, *for* 'enjoyed' *read* 'enjoined.'
„ 234, line 23, *for* 'dame' *read* 'made.'
„ 247, line 2, *for* 'decree' *read* 'decision.'
„ „ line 20, *after* 'writing' *insert* 'showing a balance in the handwriting of the prisoner.'
„ 248, note (*a*,) *for* 'Piere' *read* Peere.'
„ 257, line 25, *for* 'equale' *read* 'equali.'
„ 269, line 7, *for* 'the' *read* 'that.'
„ „ line 22, *for* 'curiœ' *read* 'curiæ.'
„ 271, line 25, *for* 'same' *read* 'some.'
„ 276, line 12, *after* 'rem' *insert* 'except.'
„ 278, line 36, *for* 'Caspigne' *read* 'Castrique.'
„ „ line 39, *for* 'Camnell' *read* 'Cammell.'
„ 279, line 5, *for* 'Camnell' *read* 'Cammell.'
„ „ line 12, *for* 'amity' *read* 'Comity.'
„ „ line 15, *dele the point after* 'decision'; *for* 'An' *read* 'and an'
„ 283, line 13, *for* 'veruis' *read* 'verius.'
„ 287. last line, *for* 'or' *read* 'and.'
„ 288, line 33, *after* 'receive' *insert* 'them.'
„ 291, lines 5 and 6, *dele* 'it is not necessary to prove that the evidence of the defendant upon the criminal charge was false; *for* 'Plaintiff' *read* 'plaintiff.'
„ 293, line 17, *for* '8400' *read* '2500.'
„ 294, line 16, *for* 'sharers' *read* 'shares.'
„ 316, line 20, *for* 'on' *read* 'in.'
„ 324, line 25, *insert* 'it' *after* 'to.'
„ 331, line 2, *insert* a period *after* 'case.'
„ 333, line 6, from bottom, *insert* 'a' *before* 'position.'
„ 335, line 16, *insert* 'as' *after* 'plaintiff.'
„ 338, line 15, *for* 'to as' *read* 'as to.'
„ 347, line 7, from bottom, *for* 'possession is' *read* 'possession is.'
„ „ line 2, from bottom, *for* 'father' *read* 'father's.'
„ 348, line 7, *for* 'and of' *read* 'and in.'
„ 366, line 21, *for* 'in tact' *read* 'intact,'
„ 378, line 17, from bottom, *for* 'lief' *read* 'life.'
„ 394, line 3, from bottom, *for* 'excuted' *read* 'executed.'
„ 401, line 12, *insert* '*G. E.*' *before* '*Branson.*'
„ 402, last line, *insert*, ' " ' *before* 'let.'
„ 405, last line, *for* 'ssue' *read* 'issue.'
„ 406, line 16, *for* 'he' *read* 'the.'
„ 449, line 4, *for* 'gratuitions' *read* 'gratuitous.'

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MADRAS HIGH COURT REPORTS.

Appellate Jurisdiction (a)

Special Appeal No. 401 *of* 1863.

VEṄKAṬASVA'MI NA'YAKKAN and others...*Appellants.*
SUBBA RAU..................................*Respondent.*

Special Appeal No. 409 *of* 1863.

SAṄKARA SUBBAIYAN and others............*Appellants.*
SUBBA RAU..................................*Respondent.*

A co-owner of village-lands sued in 1861 to have them divided among the villagers according to a custom (last observed in 1835) that at the expiration of every twelve years the lands should be re-distributed by lot among the co-owners, and to have two of the shares delivered to him as one of such co-owners.

In 1851 another co-owner had, in a suit to which some only of the present defendants were parties, obtained a decree for the periodical allotment of the lands, and in 1853 such decree, which clearly recognised the existence and validity of the custom, was affirmed on appeal.

Held:—1st. That the plaintiff need not pay an institution-fee on the aggregate amount of the value of all the shares in the village; and that the stamp on the plaint need only be proportioned to the value of the property actually sued for.

2nd. That the litigation which commenced in 1851 was sufficient to prevent the law of limitation from barring the plaintiff's right to sue, and that the circumstance that some only of the present defendants were parties to such litigation could make no difference with regard to the limitation-bar.

3rd. That though the decree of 1851 was only a judgment *inter partes*, it was, as against such of the present defendants as were not parties to the former suit, cogent evidence of the existence and validity of the custom.

Quaere whether in the absence of such litigation the law of limitation would have been a bar.

1864. *January* 11. *SS. AA. Nos.* 401 *and* 409 *of* 1863.

THESE were special appeals against the decree of A. P. Çrínivása, the Officiating Principal Ṣadr Amín of Tinnevelly, in Appeal Suits Nos. 375 and 450 of 1862, modifying the decree of Alagiri Svámi, the District Munsif of Náḍuvumaṇ-

(a) Present Scotland, C. J. and Frere, J.

1864. *January* 11. *SS. AA. Nos.* 401 *and* 409 *of* 1863.

ḍalam, in Original Suit No. 698 of 1861. This suit was brought by the respondent in both special appeals against three hundred and ten defendants to have the land belonging to the village of Vattiráyiruppu divided by lot into four hundred and thirty *pañgus* or shares, or forty-three karais, and to have two of such shares delivered to him as one of the co-owners of that village. He stated that he was entitled to two out of the 430 pañgus into which the village-land was divided, and that once in every twelve years that land was distributed by lot amongst the co-owners composing the village community. The plaintiff estimated the value of his suit at rupees 6-8-0, being the value of the two shares which he sought to recover. The defendants, some of whom were the other co-owners of the village, others vendees or mortgagees of some of such co-owners, others purchasers at Government sales of the shares of defaulters, and others claimants on darkhást of village-waste obtained from the Revenue authorities, objected that he should have paid an institution-fee on the aggregate value of the 430 shares, which would have amounted to rupees 1,30,000. They also pleaded the Act of limitation—the last re-distribution having taken place in 1835. But it appeared that in 1851 Appu Ayyañgár, one of the co-owners, in consequence of delay in making the periodical allotment and re-distribution, had obtained a decree in *Original Suit No.* 493 *of* 1851 for such allotment, and that such decree was affirmed in *Appeal Suit No.* 35 *of* 1853.

Between 1835 and 1861 some of the co-owners at their own expense improved the shares of which they were then respectively in possession : others sold their shares : others mortgaged theirs : others failed to pay the Government demands on their shares, which were consequently sold by the Revenue authorities ; and others left their shares waste, and the Revenue authorities granted such shares to strangers on darkhást.

The Munsif overruled the objections arising from the valuation of the suit and the Act of limitation ; and with regard to a question 'whether or not the lands which were improved by certain of the shareholders at their own expense and trouble are subject to a division in common with the lands of the other shareholders ?' he held " that the custom prevailing in the village from time immemorial should

be conformed to, viz., that the shareholders should take the lands by turns, whatever might be their quality and whatever might be the labour and costs incurred on their account."

1864. *January* 11. *SS. AA. Nos.* 401 *and* 409 *of* 1863.

"The next point,"—the Munsif went on to observe—"which comes under consideration is, what is the remedy for lands which have been forfeited by some of the shareholders in consequence of their inability to cultivate or to pay the Government demands thereon, or when they have disposed of any of them by sale, mortgage or otherwise?

"The Court considers that those parties who have so forfeited lands should take the consequences, that is to say in making a re-distribution of the village-lands, those parties who have lost lands under such circumstances should take their shares after deducting therefrom a quantity of land equal to that so lost by them.

"The Court therefore directs that the village of Vattirâyiruppu be distributed by lot into 430 shares, as prayed in the plaint, and that the plaintiff be thereupon put into possession of such two of the shares as may fall to him on such allotment, conformably in every respect to the custom observed in the village on such occasions."

On appeals by some of the co-owners in Suit No. 375, and by the parties holding village-land under private mortgages or sales by co-owners, or under public sale or darkhást, in Suit No. 450, the Principal Ṣadr Amín modified the Munsif's decree by declaring all the lands of the village distributable, except those waste-lands obtained by some of the defendants on darkhást, and affirmed the decree in other respects. With reference to the defendants who were not parties to Suit No. 493 of 1851, the Amín thought that the judgment in that suit decided the status of the village, and must therefore be regarded as a judgment *in rem* and conclusive against the whole world. As to the appellants in Suit No. 450 he held that "such defendants as had acquired lands either by purchase or mortgage could not claim a better right than that possessed by their vendors or mortgagors(a). Those who purchased lands at Revenue-sales, purchased the right and title of defaulters and could not therefore claim

(a) "A (village-)landholder can sell or mortgage his rights, but he must first have the consent of the village, and the purchaser steps exactly into his place *and takes up all his obligations*." Mountstuart Elphinstone, cited in Maine's *Ancient Law* 263-4.

1864. *January* 11. *SS. AA. Nos.* 401 *and* 409 *of* 1863.

an exemption which such defaulters never enjoyed." As for those who obtained waste-lands on application to the Revenue authorities, the Amín thought them entitled to exemption, and referred to the ruling of the late Ṣadr Court in *Special Appeal No.* 23 *of* 1862.

The two sets of defendants now specially appealed, and contended, first, that the suit was not rightly valued, secondly, that it was barred by the Act of limitation.

Srínivásácháriyár, for the defendants, Nos. 210, 218, 219, 223, and 226, the appellants in *Special Appeal No.* 401 *of* 1863.

Norton, for the defendants, Nos. 73, 81, 97, 135, 160, 183, 205, 206 and 308, the appellants in *Special Appeal No.* 409 *of* 1863.

SCOTLAND C. J. :—This is a suit by a co-owner of village-lands, seeking to establish his right to two shares in such lands worth about six rupees; and, with reference to the first point taken, I agree with the lower courts in thinking that it would be most unreasonable to require him to pay an institution-fee on the aggregate amount of the value of all the shares in the village. The stamp on the plaint need only be proportioned to the value of the property actually sued for; and, however much the plaint or the questions raised by the defence may affect the title of the co-owners in general, the valuation need not extend beyond the property in respect of which the plaintiff seeks a decree. This is in accordance with the law as laid down by Mr. Macpherson*(a)* citing a decision by the late Bengal Ṣadr 'Adálat, where the plaintiff appears to have sued for two-thirds of an undivided estate, and was held to have rightly laid the valuation at two-thirds of the whole value.

Then as to the Act of limitation, it seems that the village is held and enjoyed subject to a custom according to which, at the expiration of every twelve years, the separate independent holdings in the village-land appear to be extinguished, and the land (except indeed such parts of it as may have been left waste and granted to strangers by the Revenue authorities*(b)*) is re-distributed by lot among the

(*a*) *New Procedure of the Civil Courts*, 1860 p. 145, citing S. D. 1851 p. 589.
(*b*) See 1 Mad. H. C. Rep. 12, 407.

1864. *January* 11. *SS. AA. Nos.* 401 *and* 409 *of* 1863.

members of the village-community(*a*). It appears also that in 1835 a re-distribution was, in accordance with such custom, actually effected. But then it is said that, as there has been no instance of observing the custom since that time, the law of limitation has raised a bar to its exercise. Without saying whether or not, if there were nothing more in the case, that would be a sufficient answer to the present suit, I am of opinion that the litigation, which commenced in 1851, and in which the appellate Court, in 1853, upheld the validity of the custom, was quite sufficient to keep the plaintiff's claim alive and to prevent the lapse of time from being a bar to the suit. The appellants, no doubt, have attempted to make a distinction as regards the effect of the proceedings and the decree in that suit on the ground that some only of the villagers were parties to it. But as regards the law of limitation that, I think, can make no difference. The suit in effect related to all the co-owners in the village, and the decree distinctly declares the right of every villager, and amounts to a clear recognition of the existence and validity of the custom. With reference to the effect of the decree as evidence, I think the Ṣadr Amín was wrong in regarding it as a judgment *in rem*(*b*) and as such concluding all the

(*a*) As to this custom see *Papers on Mírási Right*, Madras 1862 p. 70. A similar custom prevails at Karungaḍal in the Kalkáḍu Ta'aluk (*ibid.* 165) and in North Arcot (*ibid.* 395). These are examples in India of that merely *temporary* severance of the rights of the co-owners which Mr. Maine (*Ancient Law*, 267) notes as differencing the Russian from the Indian village-community. The villages in which the custom of periodical distribution prevails are those of the *Agrahára váḍikkai*, of which the absolute proprietary right is chiefly held by Bráhmans (*Papers on Mírási Right*, 78). This tends to shew that the custom is of A'ryan, not Dravidian, origin. In the tract of country known as Toṇḍaimaṇḍalam, of which Conjeveram is the capital, landed mírás "is divided into two kinds, *Pasunkarai*, பசுங்கரை, where the whole lands of the village are held jointly and either cultivated in common or divided yearly or at some other fixed period according to established custom, and *Arudikkarai*, அறுதிக்கரை, where the lands are held in severalty and subject consequently to no periodical distribution." F. W. Ellis, *ibid.* 178, 190, 226. In Toṇḍaimaṇḍalam the practice of periodical interchange was anciently universal, *ibid.* 341-342, and see Campbell's *Modern India*, 2d ed. 85, 86. As to the German custom of annual repartition, see Tacitus, *Germania*, 26: Cæsar, *De Bello Gallico*, VI, 22: Grimm, *Deutsche Rechtsalterthuemer*, 2te Ausg. 495. As to Irish gavelkind see Hallam, *Constitutional History of England* vol. II. Compare, too, *Ancient Laws and Institutes of Wales*, Venedotian Code, Book II, cap. XII, §§ 4, 5.

(*b*) A judgment *in rem* is a solemn declaration, proceeding from an accredited quarter, concerning the *status* of the thing adjudicated upon; *which very declaration operates accordingly upon the status of the thing adjudicated upon*, and, *ipso facto*, renders it such as it is thereby declared to be. J. W. Smith, *Leading Cases* 5th ed. II, 663.

1864. January 11. SS. AA. Nos. 401 and 409 of 1863.

defendants. It is only a decree between the parties, deciding their respective rights in that suit. But as such it is good evidence against the defendants who were not actually parties to the former suit. They cannot be considered as strangers to the parties in that suit; but whether so considered or not, the custom under which the lands were held was a matter of public and general interest to all the villagers, and the former decree, therefore, as the adjudication of a competent tribunal, was most cogent evidence against them of the existence and validity of the custom, whose exercise the plaintiff now seeks to enforce. The appeals are dismissed with costs.

FRERE, J. concurred.

Appeals dismissed.

Appellate Jurisdiction (a)

Referred Case No. 26 *of* 1863.

VI'RASVA'MI NA'YAK..........................*Appellant.*
SA'YAMBARA'Y SA'HIBA' and others......*Respondents.*

Where the plaintiff, a native artist, agreed to supply and the defendants agreed to purchase pictures as ordered from time to time, subject to the approval of each picture by the defendants, the prices to be fixed on delivery and acceptance:—*Held* that a distinct contract became complete in respect of the pictures as they were from time to time delivered and approved of, at the price then fixed, and that the case came within clause 9 of section 1 of the Limitation Act (Act XIV of 1859), and not within clause 8 nor clause 2 of the same section.

1864. January 11. R. C. No. 26 of 1863.

CASE referred for the opinion of the High Court by R. B. Swinton, Judge of the Court of Small Causes at Tanjore.

Suit No. 942 of 1863 was brought for rupees 500, being the value of twenty-eight pictures supplied to the ten first defendants, the widows of the late Rájá of Tanjore, at different times between 12th August 1857 and 30th April 1858. There was no contract in writing. The defendants pleaded the act of limitation. The Judge was of opinion that the suit was barred under clause 2 sec. 1 of Act XIV of 1859 as being brought for the wages of an artisan; but submitted the following question: "whether clause 8 of section

(a) Present Scotland, C. J. and Frere, J.

1*(a)* is applicable to the case, taking the pictures to be articles sold by retail; or clause 2, taking the price to be the wages of an artisan*(b)*; or clause 9*(c)* of the same section of Act XIV of 1859"?

George Branson for the plaintiff.

Per Curiam:—We understand the facts of this case to be that the plaintiff, a native artist, agreed to supply, and the defendants one to ten through their agents agreed to purchase, pictures as ordered from time to time, subject to the approval of each picture by the defendants, the prices to be fixed upon delivery and acceptance. Under these terms a distinct contract of sale and purchase became complete in respect of the pictures, as they were from time to time delivered and approved of, at the price then fixed, and the case, we think, came properly under the enactment in clause 9 section I of Act XIV of 1859. The pictures were not, we think, articles sold by retail within clause 8; nor can their price be considered as the wages of an artisan within clause 2.

(*a*) 8. To suits to recover the hire of animals, vehicles, boats; or household furniture; *or the amount of bills for any articles sold by retail*; and to all suits for the rents of any buildings or lands (other than summary suits before the Revenue authorities under Regulation V 1822 of the Madras Code)—the period of three years from the time the cause of action arose.

(*b*) 2. To suits for pecuniary penalties or forfeitures for the breach of any Law or Regulation; to suits for damages for injury to the person and personal property, or to the reputation; to suits for damages for the infringement of copyright, or of any exclusive privilege; to suits to recover the wages of servants, *artizans*, or labourers, the amount of tavern bills or bills for board and lodging or lodging only; and to summary suits before the Revenue authorities under Regulation V. 1822 of the Madras Code—the period of one year from the time the cause of action arose.

(*c*) 9. To suits brought to recover money lent or interest, *or for the breach of any contract*—the period of three years from the time when the debt became due or when the breach of contract in respect of which the suit is brought first took place, unless there is a written engagement to the money lent or interest *or a contract in writing signed* by the party to be bound thereby or by his duly authorized agent.

Original Jurisdiction.

Original Suit No. 236 *of* 1863.

SATOOR *against* SATOOR and others.

A suit the sole object of which was to have a trust-fund paid into Court dismissed on the ground that the plaintiff had no actual title to any part of the fund.

When the plaintiff in a suit seeking solely the payment into Court of a fund for the relief of poor Armenian orphans, had no interest except as a member of the Armenian community:—*Held* that he had no such title to part of the fund as would support the suit.

Held also that the consent of the defendants, the trustees of the fund, to the decree sought by the plaintiff would not justify the Court in making it.

To support a bill *quia timet* the plaintiff must have a title in possession or expectancy and the property must be in danger.

1864. *January* 18. *O. S. No.* 236 *of* 1863.

THE plaintiff, Manook Satoor, was a member of the Armenian community at Madras, and the only relief which he sought in this suit was that the defendants Gregory Manook Satoor, Vardon Seth Sam and George Simon Macartoom, the Governors of the Madras Armenian Orphans' Fund, might be ordered by the decree of the Court to pay into the Bank of Madras, with the privity of the Accountant General of this Court, to the credit of this cause to an account entitled "In trust for the Madras Armenian Orphans' Fund," the several promissory notes of the Government of India mentioned in the schedule to the plaint, and amounting to rupees 38,000; and that the Accountant General might be directed to realize the interest already due on such notes and to pay the same and all interest that might thereafter accrue due thereon to the defendants, or any two of them, as the Governors of the Madras Armenian Orphans' Fund, until the further order of this Court.

The plaint stated that the affairs of the Madras Armenian Orphans' Fund had from time immemorial been managed by certain persons called Governors and elected by the Armenian community at Madras for a period of three years; that the present defendants were duly elected governors at a meeting of that community on the 8th of July 1863; that on the same occasion a resolution was passed that

the defendants, the Governors of the Fund, should take measures to enable them to place the said Government notes in the hands of the Accountant General under the order of this Court: that the plaintiff had applied to them to do so, but that they said they were unable, though ready and willing, to do so until an action or suit should be brought and an order made in such suit for deposit of the notes to the credit of the suit. The plaint also contained a statement that some former governors had lent the fund to the Nawáb of the Carnatic and that the late governors had recovered it from the Government of Fort St. George under the Act for administering the estate of the late Nawáb.

1864. *January* 18. *O. S. No.* 286 *of* 1863.

On the 7th December 1863 the suit came on before Bittleston, J. in chambers for settlement of issues. The defendants appeared in person, and expressed their assent to the prayer of the plaint. Bittleston, J., however, thought it doubtful whether he ought to make the decree prayed for. The case stood over that Mr. Shaw, of the firm of Ritchie and Shaw, the plaintiff's attornies, might look for cases on the subject. Mr. Shaw subsequently cited *Handley* v. *Davies(a)*; and on the 18th January 1864, Bittleston, J., after stating the facts above set forth, and observing that the sole object of the suit was to make the Court the depositary of the fund, delivered the following

JUDGMENT:—When this suit came on before me for settlement of issues, the defendants appeared in person and expressed their assent to the prayer of the plaint. But it seemed to me very doubtful whether, even with the consent of the defendants, I ought to make the decree prayed for—whether, in other words, the parties to this suit were entitled to call upon the Court to become simply their bankers as regards this fund.

The case stood over that Mr. Shaw might have the opportunity of calling my attention to any authority on the subject, and he subsequently referred me to *Handley* v. *Davies(a)*.

In that case the bill, which was filed by a legatee for life and by the remainderman, prayed that the plaintiff's legacy might be secured in Court *free of the costs of invest-*

(*a*) 28 L. J. Chan. 873 : 5 Jur. N. S. 190.

1864. January 18. O. S. No. 236 of 1863.

ment; and it appears by the report in the Jurist that there was a question (which the Court decided) between the legatees and the residuary legatee, whether the costs of investment and the legacy duty should come out of the estate or out of the legacy. The defendants' counsel conceded that the plaintiffs were entitled to have the fund secured in Court. But that was not the sole object of the suit; and, further, it was the case of a specific legacy for life to one and after his death to another, in which case formerly the remainderman was considered always entitled to have the legacy secured; though Mr. Justice Story, in his *Equity Jurisprudence* section 304, says the modern practice is not to entertain such a bill unless there be some allegation or proof of waste of the property, and in *Ross* v. *Ross*(a), the Master of the Rolls acted upon that rule.

The order for payment into Court was refused there on the ground that no sufficient reason was shown for such interposition; and in the present case I do not see any sufficient ground for interposing. There the plaintiff had an interest in the fund contingent upon the death under 21 of two infants; and the Master of the Rolls appears to have considered that would have been sufficient to entitle him to an order in a proper case. But has the plaintiff in this case any such interest in the Armenian Orphans' Fund as entitles him to require it to be brought into Court? The only interest which appears by the plaint is that he is a member of the Armenian community, which would probably (though no statement on the subject is made) give him some claim to relief out of the fund at the discretion of the Governors in the event of his falling into distress. But in no event would he have any actual title to any part of the property in question, and it is some actual title which is required to have the fund brought into Court: 2 Daniel's *Chancery Practice*, 3d ed. 1304, Story's *Equity Jurisprudence* s. 841.

This plaint is in truth in the nature of a bill *quia timet*, and to support such bills Sir John Leech, in *Fisher* v. *Hughes*(b), says, first, there must be a title in possession or expectancy in the plaintiff, and, secondly, there must be danger to the property.

(a) 12 Beav. 89. (b) Cooper's Rep. temp. Cottenham 326, 330.

Now, as I have already said, this is the case, not of a legatee suing for a legacy, nor of a suit for administration or an account in which, as incident to the other relief sought, the Court may properly require the fund to be secured pending the litigation and for the purpose of carrying out conveniently its own orders respecting the fund. But this is a suit respecting a fund devoted, as I infer, in some way to the relief of poor Armenian orphans, in which the plaintiff has no interest except as a member of the Armenian community—a suit to which the Advocate General is no party, and in which the only relief prayed is the payment of the money into Court. That being so—although the defendants, the Governors of the charity, offer no opposition to the decree for which the plaintiff prays—I do not feel myself at liberty to make such a decree. The Governors could not, I apprehend, of their own accord, from a desire to be relieved of responsibility, come and deposit the trust-fund in Court—the English Trustee Relief Acts not having been extended to this country; and their acquiescence in the plaintiff's prayer is not, I think, sufficient to relieve me from considering whether it ought to be granted. This is a Court of Justice. The administration of justice is the purpose of its establishment; and though in numerous cases the protection of property which is the subject of litigation, by requiring it to be brought into Court, is an important part of its jurisdiction, I do not think that it ought to hold itself out as a Bank in which charity-funds may at pleasure be deposited.

Suit dismissed.

Appellate Jurisdiction (a)

Special Appeal No. 202 *of* 1862.

KUNIGARATU and others............*Appellants.*

ARRANGADEN..............................*Respondent.*

An individual member of a tarawáḍ governed by the Marumakkatáyam rule has no right to an account from the káraṇavan.

Each member of a tarawáḍ has a right to succeed by seniority to the management of the family property.

Semble **an anandravan's right to maintenance is merely a right to be maintained in the family-house.**

1864. *January* 21. *S. A. No.* 202 *of* 1862.

THIS was a special appeal from the judgment of Wm. Holloway, Civil Judge of Tellicherry, in Appeal Suit No. 91 of 1862, reversing the decree of the Principal Ṣadr Amín of Tellicherry in Original Suit No. 4 of 1860. Such suit was brought for Rs. 4,550-10-5, being the balance of the amount due for maintenance since 1st Káni 1027 (15th September 1851), and also for payment in future by way of maintenance of a share of the yearly income of the family property, such share to be ascertained by dividing the income into as many equal parts as there were members of the family. The plaintiffs and defendants constituted a tarawáḍ governed by the Marumakkatáyam usage, and of which the first defendant was the káraṇavan. The Principal Ṣadr Amín decreed in favour of the plaintiff, but on appeal the Civil Judge reversed his decree in the following judgment:—

"The plaintiffs recite that they are members of a family following the rule of nephews; that the property of the family is in the hands of the eldest member, and they ask for a share of the income to be assessed by dividing the whole income into equal parts. The plaint contains the usual fallacy that all the members of the family have equal rights therein. They have equal rights in one particular; each has the right of succeeding to the management as he becomes senior in age. The whole doctrine of a Malabar family is that they are all to reside in the family-house, and be there supported by the head of the family. There never was the slightest pretence for saying that each was entitled to an account, and if the head could not show that

(a) Present Frere and Phillips, J J.

he had expended an aliquot portion of the income upon each member, that such member could sue for the balance, yet to this length the plaint and the decree of the lower court would lead us. It is manifest that the prayer of the plaint is as inadmissible as a plaint to divide the whole property between the various members would be. To give such a decree would be to violate the sound maxim that the law will not allow to be done indirectly that which it forbids being done directly. I have the very strongest doubts whether it is open to any member of a Malabar family to ask for support out of the family-house, but it being unnecessary here to decide it I forbear stating the numerous reasons for that opinion. The whole frame of the plaint being illegal, the suit must of course be dismissed with costs."

Mayne, for the appellants the plaintiffs, contended that the Civil Judge was wrong in law in saying that each member of a tarawád had no right to an account from his káraṇavan. An anandravan and his káraṇavan are respectively in the positions of a *cestui que trust* and trustee, and the right to call for an account of the trust is an incident to the beneficial enjoyment: *Springett* v. *Dashwood*(a).

Karuṇágara Manavan, for the respondent, the fifth defendant, was not called upon.

FRERE, J.:—A family governed by the Marumakkatáyam rule can possess property only in its collective capacity. The members individually are only entitled to maintenance in the family-house; and the doctrine of English equity as to the right of a *cestui que trust* to call for an account has no application to a case like the present. The law is fully explained by the learned Civil Judge in his decree, which is completely in accordance with the result of my eight years' experience in Malabar. The appeal is dismissed with costs.

PHILLIPS, J. concurred.

Appeal dismissed.

(a) 7 Jur. N. S. 93. See too *Pearse* v. *Green*, 1 J. & W. 140 per Sir T. Plumer: *Walker* v. *Symonds*, 3 Swans. 58: *Newton* v. *Asken*, 11 Beav. 152: *Gray* v. *Haig*, 20 Beav. 219: *Burrows* v. *Walls*, 5 DeG., M. & G. 253.

Appellate Jurisdiction (a)

Special Appeal No. 33 *of* 1863.

SAMAKKAUNDAN..............................*Appellant.*
PERUMA'Ḷ CHEṬṬI..............................*Respondent.*

Remarks on the doctrine of Equity as to the applicability of the defence of purchase for valuable consideration without notice.

The defence does not apply where the Court of Chancery is exercising a jurisdiction concurrent with that of the courts of law.

Where A sold land to B reserving a right to repurchase by payment of a certain sum at a specified time, and before such time had arrived, B resold to C for valuable consideration without notice and A failed to make the payment and forfeited his right to repurchase :—*Held* that he had no title unless relieved against the forfeiture, and that such relief could not be given as against C.

1864. *January* 28. *S. A. No.* 88 *of* 1863.

THIS was a special appeal from the decision of A. P. Çrínivása, the Acting Additional Principal Ṣadr Amín of Salem, in Appeal Suit No. 81 of 1861, reversing the decree of the District Munsif of Darampuri, in Original Suit No. 473 of 1860. The suit was brought to recover certain lands situate in the village of Samanúr, in the zil'a Salem, the plaintiff, a vendor claiming under a power of re-purchase, offering to pay the first defendant rupees 60. The plaintiff stated in his plaint that on the 2nd Máchi (February-March) in the year Plava (1841) he sold the disputed land to the first defendant's father for rupees 60 under a nominal deed and transferred the paṭṭá thereof to his name, after obtaining from him a counter-document marked 'A' to the effect that he (the first defendant's father) would, on payment of such amount before the expiration of the year Siddhártha (1859) deliver possession of the land with the paṭṭá thereof; and prayed that, as the first defendant had not done so, a decree might be given adjudging him (the first defendant) to deliver to the plaintiff the lands in question and to transfer the paṭṭá thereof to his name, and directing him (the plaintiff) to pay to the first defendant rupees 60.

The first defendant urged in his answer that he was unaware of the execution of the counter-document mentioned in the plaint; that he sold the disputed land to the second defendant for rupees 35, and put the same in his pos-

(a) Present Frere and Holloway, J J.

session and transferred the paṭṭá thereof to his name; and that accordingly the second defendant continued to enjoy the land.

1864. *January* 28. *S. A. No.* 33 *of* 1863.

The second defendant in his answer alleged that on the 15th Áni in the year Krodhí (1844) he bought of the first defendant the disputed land for rupees 35, and having laid out about rupees 200 upon it, continued to enjoy the same; and that 'A' was a forgery.

George Branson, for the special appellant, the second defendant submitted that his client was a *boná fide* purchaser for valuable consideration without notice; and that his possession of the premises would therefore not be disturbed.

Rájágópáláchárlu, for the special respondent, the plaintiff.

The Court delivered the following

JUDGMENT:—This was a suit to recover land under a power of re-purchase given to the plaintiff the vendor, who had sold land to the first defendant, who had sold it to second defendant.

The first defendant pleaded ignorance of the power of re-purchase, and the second defendant alleged the document containing the power of re-purchase to be a forgery, and in effect alleged that he had no notice of such a deed when he purchased in 1843 and 1844.

The Principal Ṣadr Amín reversed the decree of the District Munsif, and decreed restoration, because the first defendant could only pass the land to the second burdened with the liability to be re-purchased.

In the original argument the reversal of the decree was sought on the ground of purchase for valuable consideration, and the following issue was sent for decision by the Çivil Judge.

"Whether there was on the part of the plaintiff a tender of rupees 60, and on the part of the first defendant a refusal to accept them within the time prescribed in A."

He found that the plaintiff had never tendered the money within the time prescribed in the document providing for re-purchase.

1864. January 28. S. A. No. 33 of 1863.

There is no doubt whatever that, if these pleadings were to be looked at technically, there is not a formal allegation of purchase for valuable consideration without notice. Taking the answer with the plaint there could, however, exist no doubt in the mind of the plaintiff that the first defendant meant to allege, first, that there never was such a clause and, that, secondly, if there was, he did not know of it.

That this is the case is the effect of the findings of both the lower courts, and it only remains to determine whether the plea is in this case a good answer to the action. The necessity for the issue arose from the doubt whether the plaintiff had a good legal title. If he had sued in England there would have been no necessity for the intervention of a Court of Equity, and in a Court of law, his legal title would have prevailed. The doctrine of a Court of Equity in England upon the applicability of the plea has been most clearly and elaborately stated by the Lord Chancellor*(a)*, who has classed the cases in which this defence is commonly admitted:

1st. Where the possessor of the legal title seeks assistance to it from the auxiliary jurisdiction of a Court of Equity, as in *Bassett* v. *Nosworthy(b)*, where he sought a discovery, or where he sought a discovery and the delivery up of title-deeds from a mortgagee of the tenant for life without notice. This was the case of *Wallwyn* v. *Lee(c)*.

2nd. Where a subsequent incumbrancer has succeeded in obtaining some legal advantage and is sued by a prior equitable incumbrancer.

3rd. As a defence against an equity existing in favour of the plaintiff as against the defendant's vendor.

The Lord Chancellor also distinctly laid down that the defence does not apply where the court is exercising a jurisdiction concurrent with that of the Courts of law; and the reason manifestly is that he who is clearly entitled at law must prevail, but that if he seeks assistance from the equit-

(a) *Phillips* v. *Phillips*, 31 L. J. Ch. 321: *Joyce* v. *De Moleyns* 2 J. & L. 374. *Frazer* v. *Jones*, 12 Jur. 443, and the comments upon this case in *Stackhouse* v. *Countess of Jersey*, 1 Johns. & Hem. 721.

(b) Rep. temp. Finch, 102: 2 W. & T. L. C. 1,

(c) 9 Ves. 24

able jurisdiction of the court, this peculiarly equitable defence shall be open to the defendant. We were therefore unable to say, so long as the question of the nature of the plaintiff's title was altogether uncertain, that this was a good defence. Now, however, it clearly appears that through the failure to pay the money at the time specified the title of the first defendant was absolute save for the peculiar manner in which courts of equity have always regarded stipulations as to time. The plaintiff has no title unless relieved against his forfeiture; and this being so, it is quite clear that, even if such relief ought in the circumstances of this case to be given, it cannot be given against a purchaser for valuable consideration without notice. The result is that the decree of the lower court will be reversed, and the original suit dismissed, with costs to be paid throughout by the original plaintiff.

1864. *January* 28. *S. A. No.* 88 *of* 1863.

Appeal allowed.

Appellate Jurisdiction (a)

Special Appeal No. 132 *of* 1863.

A'NANDA'YYAN and others..............*Appellants.*
DE'VARA'JA'YYAN and others............*Respondents.*

A custom that some only of the mírásidárs of a village should bind the co-owners of the village lands is valid.

1864. *January* 28. *S. A. No.* 132 *of* 1863.

THIS was a special appeal from the decree of E. W. Bird, Civil Judge of Negapatam, in Appeal Suit No. 1 of 1862, modifying the decree of the Principal Ṣadr Amín of Negapatam in Original Suit No. 14 of 1860. This was a suit by several of the co-owners of the lands of the mírásí village of Kanari Rájápuram against the other co-owners to compel an exchange of certain lands valued at rupees 2,874-3-0. It appeared that the immemorial custom of the village was that on the expiration of every nine years the village-lands should be redistributed among the co-owners(b). In June 1850, however, they executed an instrument marked No. 1, which for the first time declared that the holdings of

(a) Present Frere and Holloway, J J.
(b) See supra p. 5 note (a).

1864. *January* 28. *S. A. No.* 182 *of* 1863.

the several míráśídárs were to be permanent(a). Disputes arose respecting this document, and a muchalká, marked D, was, in July 1850, executed before the tahṣíldár by some of the forty míráśídárs of the village on behalf of the rest, cancelling No. 1 and restoring the old custom. In 1859, however, when the period for a redistribution came round again, the first twenty-nine defendants refused to consent thereto, alleging that they were not bound by D. The Amín found that "the long-existing practice of the district sanctioned such a proceeding, and as a rule the co-parceners have always sanctioned similar documents executed by a few of the chief míráśídárs, and that it is always taken for granted that their consent is given to the execution of the document." He consequently decreed "that the defendants should in accordance with the custom of the village exchange with the plaintiffs the land specified in the plaint, with the exception of certain land bought by the thirty-sixth defendant. The Civil Judge, on appeal, affirmed the Amín's decree, except in so far as it excluded from the redistribution the land bought by the thirty-sixth defendant.

Arthur Branson, for the appellants, seven of the defendants, contended that the muchalká could have no operation against the appellants, as they were not parties and never consented thereto.

Per Curiam:—If that were so, consider what openings for fraud would be left. Here the Ṣadr Amín finds that there is a custom that these villagers should be bound by some of the míráśídárs and that the practice has long existed. We are of opinion that this custom is perfectly good, and that the appellants are bound by the exercise of it which has been called in question in the present case. The appeal must be dismissed with costs.

Appeal dismissed.

(a) *A'chandirárkkam* ஆசந்திரார்க்கம், Tel. ఆచంద్రార్కము, *áchandrárkamu*, from Skr. *áchandrárkam* 'until moon and sun (end)', from *a*, and *chandra* 'moon' and *arka* 'sun,' See 1 Mad. H. C. Rep. 407, and add this to the formulæ of limitation there mentioned: "as long as the waters of the Káveri flow, vegetation lasts, or till the end of time," *Papers on Míráśí Right* p. 80.

Appellate Jurisdiction (a)

Special Appeal No. 313 *of* 1863.

JA'AFAR MOHI'-U-DI'N SA'HIB............*Appellant.*

A'JI MOHI'-U-DI'N SA'HIB and others....*Respondents.*

Land granted for the endowment of a khatíbí(b), or other religious office, cannot be claimed by right of inheritance.

Where such a grant has been made the members of the grantee's family have no right at his death to a division amongst them of the income derivable from the land.

The right to the income of such land is inseparable from the office for the support of which the land was granted.

THIS was a special appeal from the decision of George Ellis, the Civil Judge of Cuddalore, in Appeal Suits Nos. 77 and 78 of 1862, reversing the decree of the Mufti Ṣadr Amín of Cuddalore in Original Suit No. 42 of 1861. 1864. *February* 1. *S. A. No.* 313 *of* 1863.

The suit was brought for the recovery of the profits of the ina'am village-lands of Minamúr, on the ground that such lands had been granted to one Muḥammad 'Alí deceased, the plaintiff's grandfather, as an endowment attached to the office of Khatíb(c), and that the plaintiff was the sole recognised incumbent of this office, and therefore solely entitled to its emoluments.

The Ṣadr Amín decided in favour of the plaintiff's claim; but this decision was modified by the Civil Judge, who affirmed the plaintiff's title to the office of Khatíb, but declared him not entitled to the full benefit of the income derivable from the endowment. Such income the Civil Judge considered to be divisible among the plaintiff, the first defendant his uncle, and the other members of the plaintiff's family as heirs of Muḥammad 'Alí, although (as the Civil Judge admitted) the *lands* could not be claimed by right of inheritance.

Arthur Branson, for the special appellant, the plaintiff.

Rájágópáláchárlu, for the special respondents, the first, second, third and fifth defendants, referred to Reg. IV of 1831, sec. 2 as excluding the jurisdiction of the Court.

(a) Present Scotland, C. J. and Frere J.

(b) خطيبي 'the office of preacher.'

(c) خطيب 'a preacher, a public reader or speaker.'—WILSON.

1864. February 1. S. A. No. 313 of 1863.

SCOTLAND C. J :—That regulation seems to apply to cases of grants of personal charity, and not to religious endowments. As a rule, the jurisdiction vested in the courts of the country can only be excluded in a particular case by clear express prohibition.

The Court delivered the following

JUDGMENT :—It has been clearly established that the lands in question were granted to the plaintiff's grandfather, Muḥammad 'Alí, to be held as an endowment for the performance of the duties of the office of Khatíb and providing for the services attached thereto. It also appears that the plaintiff succeeded to the office and has been performing the duties of it; and the sole question is whether the plaintiff became entitled in right of the office to receive the whole amount of tírvai derived from the lands or only a share of it, the same being divisible amongst the members of Muḥammad 'Alí's family at his death. We are of opinion that the enjoyment of the land passed with the office, and that the plaintiff in right of the office was entitled to receive the whole of the tírvai.

The lands having been granted for the endowment of a religious office could not, as observed by the Civil Judge, be claimed by right of inheritance; and for the same reason the members of Muḥammad 'Alí's family had no right at his death to a division amongst them of the tírvai derivable from the land. The right to the enjoyment of the returns from the lands was not separable from the office for the support of which the grant was made, and the plaintiff, as the legal holder of the office, and charged with the due performance of all the duties and services attached to it, was entitled to demand and receive the tírvai.

We are therefore of opinion that the decree of the Civil Judge must be reversed and the decree of the Ṣadr Amín affirmed. The costs of the plaintiff in this and the lower courts to be borne by the first, second, third, fourth and fifth defendants.

Appeal allowed.

NOTE.—See *Hedáya* Book XV, Hamilton's translation p. 346.

Appellate Jurisdiction (a)

Regular Appeal No. 69 *of* 1863.

PENUBALLI SUBHARA'MAREḌḌI and others...*Appellants.*
BHI'MARA'JU RA'MAYA..........................*Respondent.*

A vakíl received money for his clients and gave it to their agent for delivery to them: the agent did not deliver it accordingly and the vakíl was compelled by the Civil Court to pay it over again. The vakíl thereupon sued the agent for the money:—*Held*, first, that the case fell under sec. 16 of the Act of limitations; secondly, that, treating the case as one of implied contract, the cause of action arose when the plaintiff was compelled to pay money which the defendant was legally bound to pay; and, thirdly, that if the defendant was in truth the plaintiff's agent, but had induced the plaintiff to make him so by the fraudulent representation that he was the agent of the clients, the cause of action would have arisen at the discovery of the fraud.

1864. *February* 4. *R. A. No.* 69 *of* 1863.

THIS was a regular appeal from the decree of E. Story, the Civil Judge of Nellore, in Original Suit No. 8 of 1863.

Rájágópáláchárlu for the appellants, the defendants.

Rangayya Náyuḍu for the respondent, the plaintiff.

The facts appear from the following

JUDGMENT :—This was a suit for the recovery with interest, of rupees 3,388-9-6 received by the plaintiff on account of his clients, and delivered to the second defendant, of the same family as their agent, for transmission to them. It is alleged that the defendant did not deliver the money, and that the plaintiff was compelled by an order of the Civil Court to pay it.

The defendant, in effect, alleged that the money had been paid.

The Civil Judge decreed the amount sued for, and in appeal it was scarcely attempted to deny that he had correctly appreciated the evidence. In truth, the evidence, if believed, would not prove payment.

The first question is upon the Act of limitations, and it is clear that the case falls under section 16, for it is manifestly a suit for which no other period of limitation is ex-

(a) Present Phillips and Holloway, J J.

1864. February 4. R. A. No. 69 of 1863.

pressly provided. If brought within six years, therefore, it is well brought. Moreover, treated as a case of contract as this appeal treats it, the cause of action arose in 1863, the period at which the plaintiff was compelled to pay money which the second defendant was legally compellable to pay(a). That compulsion was an order of the court upon one of its own practitioners, and it is quite sufficient to deprive the transaction of the slightest colour for the argument that the payment was voluntary. It is clearly a case in which the request will be implied. If, however, the second defendant was in truth the agent of the plaintiff, but induced the plaintiff to make him so by the fraudulent representation that he was the authorized agent of the women, the cause of action would arise at the discovery of the fraudulent representation and still in 1863. The case has, however, been treated throughout as a case of implied contract, and so treating it, there exists no doubt of the plaintiff's right to recover. This appeal must be dismissed with costs.

Appeal dismissed.

(a) 1 Smith L. C. 5th ed. p. 140.

Appellate Jurisdiction (b)

Referred Case No. 2 of 1864.

ÁDIMULAM PIḶḶAI *against* KOVIL CHINNA PIḶḶAI.

A zamíndárí was attached in 1827, and the Collector, without authority from the Board of Revenue or the Government, remitted a portion of the tírvai and continued such remissions till 1842, when the zamíndárí was restored. The then zamíndár and his successors continued the remissions, always, however, entering the faisal rates in the paṭṭás and setting down the remissions as *muzáris*.

In 1861 the plaintiff became lessee of the zamíndárí, and in 1862, pursuant to notice, he tendered paṭṭás for faslí 1272 to the defendant and the ryots at the faisal rates.

Held:—First, that the plaintiff was not precluded from raising the rents to the amount of the faisal assessment: second, that the Act of limitations did not apply; and, third, that the plaintiff might sue in a Court of Small Causes for the rent due for faslí 1272.

The word 'suit' in the proviso of sec. 3 of Act XLII of 1860 refers to regular suits before a Collector under Act X of 1859 and not to the summary proceedings under Regulation XXVIII of 1802 and sec. 2 of Regulation V of 1822.

1864. February 22. R. C. No. 2 of 1864.

CASE referred for the opinion of the High Court by J. D. Goldingham, Judge of the Small Causes Court at Madura, in Suit No. 1449 of 1863. The facts stated

(b) Present Scotland, C. J. and Frere, J.

were as follows:—Suit No. 1449 of 1863 was brought by the plaintiff as lessee of the zamíndári of Kannivadi for rupees 194-3-6 being the arrears of ḳist due by the defendant for the lands cultivated by him in faṣlí 1272 (A. D. 1862-63), upon paṭṭá fixed at faiṣal rates, tendered to and refused by the defendant.

The defendant admitted that the demand was according to the faiṣal rate, but contended, first, that the plaintiff's claim was barred by the law of limitation, inasmuch as the Collector of the district some time prior to faṣli 1237 when the zamíndárí was under his management, granted a remission of a portion of the tírvai; secondly, that this demand was unjust and excessive; and, thirdly, that the suit being for one year's tírvai was not cognizable by a Small Causes Court, but by the Revenue authorities.

It appeared that the zamíndárí of Kannivadi was attached for arrears of ḳist in 1827 and remained so till 1842. In 1827 the then Collector Mr. Rous Peter, without any authority from the Board of Revenue or Government, remitted a portion of the tírvai to the ryots, and continued these remissions during the whole time the country was under his management. In 1843 the zamíndárí was restored to the then zamíndár, and both he and his successors followed the same practice, at the same time applying to Government for a reduction of peshkash, which, however, was not granted. The faiṣal rates were always entered in paṭṭás and the remission was set down as *munásib(a)* or remission that was proper and convenient. In 1861 the plaintiff became the lessee of the zamíndárí and finding himself unable to meet the demands upon the estate, resolved to have recourse to the faiṣal rates of assessment. Accordingly in 1862 previous to the commencement of faṣlí 1272 he issued an ishtihár to the ryots, to the effect that if they would consent to pay him one year's assessment as ina'am to clear off the debts on the estate, he would continue the reduced assessment, but if not he should be obliged to resort to the faiṣal rate. He also requested that if any ryots took exception to this demand they should ap-

(a) مناسب

1864. February 22. R. C. No. 2 of 1864.

pear before him with petitions within two months. In accordance with this proclamation and as no objections were forthcoming, the plaintiff tendered a paṭṭá to the defendant, as well as to other ryots, according to the rates laid down at the faiṣal, but the defendant at the time refused to receive the paṭṭá, and has since withheld all payment of his rent for that faṣlí. The plaintiff accordingly now sued for the rent due for faṣlí 1272.

Upon the foregoing facts the Judge was of opinion that the demand of the plaintiff was good in law, that it was not barred as pleaded, and that the case was cognizable in the Court of Small Causes. But upon the application of the defendant he referred this case; and accordingly the questions for the decision of the High Court were

"First, Whether the plaintiff's demand is good in law.

"Secondly, Whether or not the case was barred by the statute; and

"Thirdly, Whether the case is cognizable by the Judge of the Court of Small Causes."

Norton and *Mayne*, for the plaintiff.

Geo. Branson and *Arthur Branson*, for the defendant.

The Court delivered the following

JUDGMENT:—We are of opinion upon the facts stated that the payment by the ryots of less than the full amount of the faiṣal rates for the several years mentioned in the case did not preclude the plaintiff, as lessee of the zamíndárí, from again raising the rents to the amount of the faiṣal assessment, and issuing paṭṭás at such rates for a new faṣlí. The former assessment remained unchanged and in force; and an entry of the full amount of the assessment was, it appears, regularly continued in the paṭṭás issued at the reduced rents. All that the plaintiff did was to discontinue for a new faṣlí the remission which up to 1861 had been as an indulgence allowed to the ryots from faṣlí to faṣlí; and having duly tendered to the defendant a paṭṭá, we are of opinion that he is entitled to enforce his claim against the defendant for the increased amount. We are also of opinion that the Act of limitations has no application to the claim. As respects the third question we think that

1864. *February* 22. *R. C. No.* 22 *of* 1863.

a Court of Small Causes is not barred by the proviso in section 3 Act No. XLII of 1860 from taking cognizance of a suit of this description. The summary process authorized by Regulation XXVIII of 1802 and section 2 Regulation V of 1822*(a)* for recovery of rent by distress or arrest and imprisonment differs widely in character from the procedure prescribed for a regular suit; and we think that the word "suit" in the provision of section 3 of Act XLII of 1860*(b)* refers to regular suits, and consequently that summary proceedings under those Regulations cannot be considered as "suits" within the meaning of the proviso. In the Presidency of Bengal the remedy for a landholder desirous of enforcing his claim for rent against a tenant is by regular suit before a Collector under the provisions of Act No. X of 1859, appealable direct to the Civil Judge or the High Court, as the case may be; and we think that it is to suits of this latter description that the proviso in section 3 of the Small Cause Court Act XLII of 1860 was intended to apply.

(a) First. Collectors are hereby authorized to take primary cognizance, by summary process, of all cases which, under the provisions of Regulations XXVIII and XXX of 1802, were summarily cognizable by the zila' courts, with the exception of the cases referred to in Sections XXXV and XL, Regulation XXVIII of 1802; and they shall have power to assess such damages, penalties and costs as may appear to them proper, but not exceeding in any case the amount limited in the particular provision of the Regulation under which each case was respectively cognizable in the zila' courts.

Second. Provided, however, that no damages, penalties or costs which a collector may award under this Section, shall be levied until after the expiration of the period hereinafter limited, during which an appeal may be preferred against the said collector's decision.

(b) The following are the suits which shall be cognizable by Courts of Small Causes constituted under this Act, namely, *claims for money due, whether on bond or other contract*, or for rent, or for personal property, or for the value of such property, or for damages, when the debt, damage or demand does not exceed in amount or value the sum of five hundred Rupees. Provided that no action shall lie in any such Court on a balance of partnership account, unless the balance shall have been struck by the parties or their agents; or for a share or part of a share under an intestacy, or for a legacy or part of a legacy under a will; or for any claim for the rent of land or any other claim for which a *suit* may be brought before a Revenue Officer; or for the recovery of damages on account of alleged personal injuries, unless special damages of a pecuniary nature shall have resulted from such injury.

Appellate Jurisdiction (a)

Special Appeal No. 366 *of* 1863.

PALAṆIYAPPA CHEṬṬI and others......*Appellants.*
ÁRUMUGAM CHEṬṬI and another.......*Respondents.*

As between Hindús oral evidence is admissible to shew that land nominally purchased for A and conveyed to him by an instrument in writing was really purchased for A, B, and C.

Special Appeals No. 127 *of* 1855, *No.* 122 *of* 1856, *No.* 26 *of* 1858, and *No.* 230 *of* 1859 overruled.

Special Appeal No. 366 *of* 1861 concurred in.

Gopeekrist Gosain v. *Gungapersaud Gosain* (6 Moo. I. A. C. 13) followed.

1864. *February* 22. *S. A. No.* 366 *of* 1863.

THIS was a special appeal against the decision of the Principal Ṣadr Amín of Coimbatore, in Appeal Suit No. 247 of 1862, affirming the decree of the District Munsif of Coimbatore, in Original Suit No. 42 of 1862. The plaintiff sued to recover one-third of certain lands in the ḳasba Coimbatore, together with one-third of the net profits. It appeared that in 1851 one Aṅkappa Cheṭṭi, deceased (the plaintiff's adoptive father) and the first and second defendants agreed to buy the lands in question in the name of the first defendant, and that each of the three purchasers should have an equal third share of such lands when purchased. The lands were bought accordingly, a bill of sale was executed by the vendor in favour of the first defendant and the purchase-money due for Aṅkappa's share was paid to the first defendant. The first defendant refusing to assign Aṅkappa's share, the present suit was brought. The Munsif and, on appeal, the Ṣadr Amín admitted oral evidence to shew for whom the lands were really bought, and accordingly decided in favour of the plaintiff. All the parties were Hindús.

Mayne, for the appellants, the first and second defendants, admitted that in an English Court of Equity oral evidence would be receivable to shew the real nature of the transaction; but contended that a series of decisions by the late Ṣadr Court had established that, as between Hindús in the Madras Presidency, a trust could not be set up by such evidence, contrary to the express terms of an instrument in writing: *Special Appeal No.* 127 *of* 1855*(b)*: *Special Appeal No.* 122 *of* 1856*(c)*: *Special Appeal No.* 26 *of* 1858*(d)*: *Special Appeal No.* 230 *of* 1859*(e)*.

(a) Present Scotland, C. J. and Frere, J.
(b) Referred to in M. S. D. 1860 p. 99.
(c) Mad. S. Dec. 1857 p. 14.
(d) M. S. D. 1858 p. 106.
(e) Mad. S. Dec. 1860 p. 98.

1864. February 22. S. A. No. 366 of 1863.

It is true that *Special Appeal No.* 366 *of* 1860(*a*) is contra; and *Gopeekrist Gosain* v. *Gungapersaud Gosain*(*b*), is a distinct authority for upholding the validity of a *benámí* purchase. The latter case, however, arose in Bengal.

The respondents did not appear.

SCOTLAND, C. J.:—There really can be no doubt in this case. The question is whether, as between Hindús, where, as here, land is purchased and the conveyance taken in the name of one, but the purchase-money, altogether or in part, comes from another, a writing is absolutely necessary to establish a trust in favour of the latter. I am clearly of opinion that it is not. I adhere to and repeat the proposition laid down in a case reported at p. 100 of the first volume of the Madras High Court Reports—"in no case does Hindú law appear absolutely to require writing, though as evidence it regards and inculcates writing as of additional force and value." That case, no doubt, arose on an exchange. But as regards the admissibility of oral evidence there is no distinction between it and the present.

As to those cases cited from the Ṣadr Decisions (with the exception of *Special Appeal No.* 366 *of* 1861, in which I concur) I can only express my dissent from them if they are to be taken as laying down absolute law as to the inadmissibility of oral evidence under the circumstances respectively appearing therein. The decision in the sixth volume of Moore's Indian Appeal Cases is a clear authority, if such were wanted, as to the validity of a *benámí* transaction; and there seems no ground whatever for supposing that in this respect the Hindú law of Bengal differs from that which prevails in this Presidency. The appeal must be dismissed.

FRERE, J. concurred.

Appeal dismissed.

(*a*) "When a Muḥammadan husband purchased property in the name of his wife, and such property was sold by the Sheriff in an action against the husband, and the wife's brother claimed under an assignment from the wife, and the Court found collusion between the husband and brother:—*Held*, that the Court was warranted in finding that, though the property stood in the name of the wife, yet that it was in fact the property of the husband. (Both Courts found that the alleged assignment from the wife was a forgery and decreed the plaintiff the possession of the property which he purchased at the Sheriff's sale. The brother appealed) S. A. rejected. 366 of 1860, 20th July 1861 [Present] Phillips and Frere [J J.]" *Ex relatione* Mr. J. W. Branson.

(*b*) 6 Moo. I. A. Cases 13.

Appellate Jurisdiction (a)

Regular Appeal No. 25 *of* 1861.

GOLLA NA'GABHU'SHANAM............*Appellant.*
KANAKALA GANGAYYA' and another,...*Respondents.*

A member of an ordinary trading partnership dissoluble at will cannot, except under special circumstances, seek an account without praying a dissolution.

1864. *February* 25. *R. A. No.* 25 *of* 1861.

THIS was a regular appeal from the decision of C. R. Pelly, the Acting Civil Judge of Masulipatam, in Original Suit 108 of 1859. This suit was brought by the plaintiff, as partner in the Brig Ratnamála, for rupees 2,713-3-2 said to be due to him by the defendants, his co-partners, on various accounts, but chiefly in respect of profits made by the ship on her voyages from 1854 to 1858. He did not ask a dissolution. The Civil Judge decreed the first defendant, who managed the affairs of the ship, to pay rupees 770-7-11¾ to the plaintiff and rupees 1,032-7-4¾ to the second defendant, with interest from the date of judgment at the rate of one per cent. per mensem.

Mayne, for the special appellant, the plaintiff.

Sloan, for the first defendant.

Geo. Branson, for the second defendant.

The judgment of the Court was delivered by

HOLLOWAY, J.:—So far as the extremely obscure pleadings enable us to form an opinion, the plaintiff alleges himself to be a partner in a ship and her trading voyages and claims a sum of money on various accounts, but mainly profits made.

The first defendant seemed to deny the partnership with himself, although not very distinctly; but alleged that there was nothing due to either the plaintiff or the second defendant. In his rejoinder, he seems to admit it.

The second defendant, another partner, really supported the plaintiff's demands, and alleged demands of his own upon the first defendant.

The Civil Judge made a decree settling the sums due by the first defendant to the plaintiff and the second defendant.

(a) Present Phillips and Holloway, J J.

At the first hearing of this case a compromise was recommended, and the case stood over for the purpose; but nothing has been done by the parties thereupon. It was also intimated that the case was one of a very peculiar character and that it was exceedingly doubtful whether such a suit ought to be permitted. On a further consideration we are of opinion that to allow such a suit, would be to authorize all trading adventurers to compel the courts to perform the office of book-keepers to them. There would be nothing to prevent these so-called partners still carrying on their joint adventure, still striving as they certainly would do, to over-reach one another, and resorting monthly to the court to settle the consequent squabbles between them. We think it most inexpedient that such proceedings should be permitted, and we are unable to find any warrant for them in the law of any civilized nation. The common law of England would of course not entertain such an action: *Bovill* v. *Hammond(a)*. Whether a bill in equity for an account will be permitted, without a prayer for a dissolution, is a more difficult question. That it will not, was the distinct opinion of Lord Eldon in *Forman* v. *Homfray(b)*; and that great Judge, in answer to the argument of Sir S. Romilly, said "if a partner can come here for an account merely pending the partnership, there seems to be nothing to prevent his coming annually." If Lord Eldon had been acquainted with Asiatic litigants, he would have expected a more frequent recurrence. It is important also to notice that Sir S. Romilly admitted his inability to produce any authority for such a bill.

BIBL. COD. COLL. OMN. ANIM. OXON.

Wallworth v. *Holt(c)*, in which Lord Cottenham is supposed to have over-ruled the doctrine of Lord Eldon, was a case of very special circumstances. It was a prayer that an account should be taken of the partnership assets of a bankrupt joint stock company, the assets secured, a re-

(a) 6 B. & C. 149. "Except in an action of account, which is almost obsolete, it is a general rule that between partners, whether they are so in general or for a particular transaction only, no account can be taken at law, nor except in an action of account, can a partner sue another at law, unless the cause of action is so distinct from the partnership accounts as not to involve their consideration, and unless the plaintiff if he recovers will be justified in keeping what he may get without afterwards having to account to his co-partners for it." Lindley on *Partnership*, 739.

(b) 2 V. & B. 329, and see per Alderson B. in *Knebell* v. *White*, 2 Y. & C. Ex. 15, 21.

(c) 4 My. & Cr. 619. See *Hall* v. *Hall*, 3 Mac. & G. 89 per Lord Truro L. C. See too per Wood V. C. 2 Johns. & H. 114.

1864. *February* 25. *R. A. No.* 25 *of* 1861.

ceiver appointed, and the whole converted into money and applied in satisfaction of the partnership debts; and at page 635 of the report, the Lord Chancellor puts the relief upon the special circumstances of that case.

The dictum of Sir J. Leach in *Harrison* v. *Armitage*(a) is wholly extra-judicial, for he considered the partnership not established. *Richards* v. *Davies*(b) is, indeed, a distinct decision by the same learned Judge, who, without remark upon Mr. Pemberton's argument shewing the real nature of *Forman* v. *Homfray*, which in the former case Sir J. Leach had mistaken, chose to overrule the dictum of Lord Eldon. The partnership, too, in this case was for a long term of years which had not expired. The late Vice-Chancellor of England distinctly refused to follow Sir J. Leach's dictum, and pointed out the absurd consequences which would result from it(c); and Lord Cottenham's hinted dissent in a case (*Wallworth* v. *Holt*) which he admitted to be entirely distinguishable, can by no means be taken as over-ruling Lord Eldon's doctrine. *Fairthorne* v. *Weston*(d) is another case in which an account, an injunction, and a receiver were granted without a prayer for a dissolution; but here the fraudulent acts of the partner were done and were alleged to be done to force on a dissolution. The Vice-Chancellor Wigram held the bill not demurrable because there was not a prayer for a dissolution. There is therefore no authority whatever for the position that a member of a common trading partnership, dissoluble at will, may, under ordinary circumstances, seek an account without praying a dissolution.

We are of opinion that it would be most pernicious to introduce such a doctrine; and, reversing the decree of the Court below, we dismiss the original suit without costs.

Appeal allowed.

(a) 4 Madd. 143. (b) 2 Russ. & Mylne, 347.
(c) *Loscombe* v. *Russell*, 4 Sim. 8. (d) 3 Hare, 387. Here, too, the partnership was for a term of years which had not expired.

NOTE.—The Reporter has reason to know that the cases quoted at p. 811 of Mr. Lindley's *Law of Partnership*—*Sheppard* v. *Oxenford*, 1 K. & J. 491: *Apperly* v. *Page*, 1 Ph. 779 and *Clements* v. *Bowes*, 17 Sim. 167—in support of the proposition that "the last remnant of the doctrine that in partnership cases, there can be no account without a dissolution, must be considered as swept away" were considered by the learned Judge, who pronounced the above decision, as distinguishable and as not carrying any further the doctrine in *Wallworth* v. *Holt*.

In *Sheppard* v. *Oxenford* the plaintiff and defendant were respectively *cestui que trust* and trustee. In *Apperly* v. *Page* and *Clements* v. *Bowes*, as

in *Wilson* v. *Stanhope* 2 Coll. 629, and *Cooper* v. *Webb*, 15 Sim. 454, the parties were too numerous to be brought before the Court. (Hence a dissolution could not be prayed, for to a bill praying a dissolution all the partners must be parties: *Evans* v. *Stokes*, 1 Keen 24: *Richardson* v. *Hastings*, 7 Beav. 307). In *Apperly* v. *Page*, moreover, as in *Wallworth* v. *Holt*, the partnership had proved a failure.

On the whole it seems that the old rule—that a suit for an account must pray a dissolution—is still in force except in the following cases: 1st. Where one partner has sought to withhold from his co-partner the profit arising from some secret transaction (*Hickens* v. *Congreve*, *Fawcett* v. *Whitehouse*, 1 R. & M. 150, 133, Lindley Ptp. 494, 806, 807). 2nd. Where one partner has sought to exclude or expel his co-partner or to drive him to a dissolution (*Chapple* v. *Cadell*, Jac. 587, *Fairthorne* v. *Weston*, Lindley 807, 809). 3rd. Where the partnership has proved a failure and a limited account will result in justice to all parties: *Wallworth* v. *Holt* and Lindley 809. 4th. Where one co-owner of a mine has excluded another from his share of the profits, (*Bentley* v. *Bates*, 4 Y. & C. Ex. 182). 5th. Where, as in the case of most joint stock companies, the partners are so numerous that it is impossible to make them all parties (38 is not too great a number, *Bainbridge* v. *Burton*, 2 Beav. 539). 6th. Where the partnership is for a term of years which has not expired. 7th. Where the Court's interference is needed to prevent the loss or destruction of partnership property, 3 Mac. & G. 89: *Miles* v. *Thomas*, 9 Sim. 606, 609.

Appellate Jurisdiction (a)

Regular Appeal No. 63 *of* 1863.

ÇIVA RAU NANAJI′..................*Appellant.*

JE′VANA RAU and others...............*Respondents.*

An estoppel in pais need not be pleaded in order to make it obligatory.

With the Indian system of pleading a party's statement in a judicial proceeding cannot be excluded like allegations in bills in equity and pleadings at common law.

But mere statements for the purpose of a particular judicial proceeding can only be conclusive evidence in another proceeding as to such material facts embodied therein as must have been found affirmatively to warrant the judgment of the Court upon the issues joined. They are then conclusive between the same parties, not because they are the statements of those parties: but because for all purposes of present and prospective litigation they must be taken as truth.

A brought a pauper suit and virtually denied possession of certain property. B petitioned to dispauper A, alleging that A was possessed of such property. The Court decided that A was in possession, and rejected her prayer to be allowed to sue as a pauper:—*Held* in a subsequent suit by A's representative against B's representative for the property that even if A's allegation found to be false could be treated as an estoppel, B's allegation found to be true would also be an estoppel; and "estoppel against estoppel setteth the matter at large"; but that although A's allegation was receivable evidence against A and her representative, they were not concluded by such allegation and the decision thereon.

Pickard v. *Sears* observed upon.

Freeman v. *Cooke* followed.

1864. February 25. R. A. No. 63 of 1863

THIS was a regular appeal from the decree of G. A. Harris, the Civil Judge of Chittúr, in Original Suit No. 1 of 1862.

The plaintiff sued as the adopted son of the brother and heir of Nanu Royer, to recover $\frac{1}{10}$th share of some rent-

(a) Present Phillips and Holloway, J J.

1864. February 25. R. A. No. 63 of 1863.

free lands in certain villages in the Árani jágír hitherto held in co-parcenery.

The sixth and only substantial defendant alleged a sale to his father by the elder brother of the plaintiff's adoptive father, who died in 1837. This defendant pleaded the statute.

The other defendants did not dispute the plaintiff's right of inheritance; but alleged that the plaintiff was entitled to the income only, and that for this the sixth defendant only was responsible.

The Civil Judge set aside the plea of the statute, but dismissed the plaintiff's suit for the reasons stated in the following extract from his judgment.

"During the hearing I directed the attention of the plaintiff's vakíl to the defendant's exhibit No. 6, and called upon him to show whether his client's suit was not estopped thereby. He argued that because the Civil Court of Combaconum had rejected the prayer of Nagani alias Sundarabáyi to sue as a pauper, that therefore the fact of her having disclaimed the right to the property now in dispute could not prejudice the plaintiff. I find from defendant's exhibit No. 6 and plaintiff's documents C and G to N, that in 1846 the aforesaid female, through whom the present plaintiff inherits, brought a pauper suit in the zila' Court at Combaconum to recover a certain amount of a Tanjore bond debt against the present sixth defendant's father and other members of the family. In the schedule attached to her plaint she virtually denies the being in possession of the property which the plaintiff now claims, and the value of the produce of which the plaintiff alleges she received up to 1851. The sixth defendant's father then petitioned to dispauper her and examined witnesses to show her possession and enjoyment of the produce of this very estate. Her vakíl then endeavoured to shake that evidence by cross-examination. I conclude that under the then practice the said female swore to the truth of her schedule, and she is clearly estopped by that suit from seeking to recover property to which she had disclaimed all right and title. I do not therefore see how the plaintiff who stands in her place can do so. How could she come into Court and swear to the truth of the present claim as required by the Code in

opposition to what she had sworn and attempted to prove in 1846?"

1864. *February* 25. *R. A. No.* 63 *of* 1863.

"This and the Combaconum suit show the unscrupulous manner in which the Courts of this country are resorted to. The plaintiff's predecessor Sundarabáyi swore in 1846 to the non-possession of property which plaintiff asserts was enjoyed by her up to 1851, and the sixth defendant's father then pleaded and proved that the said female was possessed of certain lands which his son now affirms his father held since 1837 in virtue of a deed executed to him by that woman's husband."

The plaintiff now appealed.

Srínivásáchàriyár, for the plaintiff, the appellant.

Mayne, for the third respondent, the sixth defendant.

The Court, after stating the facts above set forth, delivered the following

JUDGMENT:—It appears that in a litigation by persons whose acts are evidence against the plaintiff and sixth defendant respectively, it was alleged by Sundarabáyi and denied by the father of the sixth defendant, that Sundarabáyi was entitled to sue as a pauper. The father of the sixth defendant obtained a decision of the Court that Sundarabáyi was in possession of this very property. Even, therefore, if this bare allegation, negatived by the judgment of the Court, could be treated as an estoppel, the allegation of the father of the sixth defendant found to be true, by the Court, would also be an estoppel, and "estoppel against estoppel setteth the matter at large." It is true, as pointed out by Baron Parke (2 Exch. 662), that an estoppel in pais need not be pleaded in order to make it obligatory. The present admission falls under the class of admissions made by statements in judicial proceedings; and as to bills in equity and pleadings at common law, the following rule is given by Baron Parke. "It would seem that those (bills in equity) as well as pleadings at common law are not to be treated as positive allegations of the truth of the facts therein for all purposes, but only as statements of the case of the party to be admitted or denied by the opposite side and if denied to be proved and ultimately submitted for judicial

1864. February 25. R. A. No. 63 of 1863.

decision." There is no doubt whatever that with our system of pleading we could not properly exclude any allegation of a party as the Court in *Boileau* v. *Rutlin(a)*, excluded this bill in equity. That rule rests, as we all know, upon the wholly fanciful character of such documents.

Mere statements however for the purposes of a particular judicial proceeding can only be conclusive evidence in another proceeding as to such material facts embodied therein as must have been found affirmatively to warrant the judgment of the Court upon the issues joined. They are then conclusive between the same parties, not because they are the statements of those parties, but because for all purposes of present and prospective litigation, they must be taken as truth. The decision upon this miscellaneous proceeding to dispauper the plaintiff was of course not in strictness a judgment, and even if therefore a decision had been given verifying the facts alleged by Sundarabáyi, she would not have been concluded. The decision really declared her statements false, and those of the sixth defendant's father, wholly inconsistent with the present allegations of the sixth defendant, true. Such statements as these are really mere representations, and if the allegation of Sundarabáyi concluded her, it could be only upon the principle of *Pickard* v. *Sears(b)* and similar cases. The doctrine of that case is simply that if a man by his representation wilfully induces another to alter his situation, he shall, as against that other, not be permitted to dispute the representation so made. It is unnecessary now to discuss the wild lengths to which this principle was pushed in some cases in England and in many in this country. The law was settled by the decision in *Freeman* v. *Cooke(c)*, and is thus tersely stated by Lord Campbell: "Now I accede to the rule laid down in *Pickard* v. *Sears* and *Freeman* v. *Cooke*. "If a party wilfully makes a representation to another, meaning it to be acted upon, and it is so acted upon, that gives rise to what is called an estoppel. It is not quite properly so called; but it operates as a bar to receiving evidence contrary to the representation, *as between those parties(d)*." Now so far from acting upon the representation, the father of the sixth defendant denied it and

(a) 2 Ex. 665. (b) 6 A. & E. 469. (c) 2 Ex. 654.
(d) *Howard* v. *Hudson*, 2 El. & Bl. 10.

successfully proved it to be false, and there cannot exist the slightest pretence for concluding the plaintiff by her statements. The decision arrived at by the lower Court will show the necessity for these lengthened remarks upon so simple a matter, and for distinctly pointing out, that, like all admissions, this statement is receivable evidence against her who made it, and those who claim under hèr, but that mere admissions can never amount to estoppels unless made in circumstances such as have been described.

This being so, the decree of the Civil Judge must be reversed, and it would be necessary to remand the suit for decision upon the issues raised, if the record did not contain matter, ample to justify a decree.

The right of the plaintiff to succeed is not denied unless the purchase or hostile possession is made out. That there was no hostile possession, the Civil Judge was very properly satisfied from the decision at Combaconum based upon the representations of the sixth defendant's father, that Sundarabáyi was actually in receipt in 1846 of the produce of this share, and this rendered it proper to credit the evidence for the plaintiff that she was in receipt up to her death. The alleged purchase, the sixth defendant declined attempting to prove. It is not difficult to see, that with his father's proceedings in 1846, before his eyes, he exercised a wise discretion, but, by success upon this issue alone could he resist a decree for the plaintiff. The allegations of sixth defendant show that he is in possession of the share of Tiyagarája Ráyar, and the decree will therefore be that he deliver up to the plaintiff the amount of land claimed by the plaint with the sum of rupees 2,864-8-6, and that he pay interest upon this principal sum from the date of the plaint to the date of execution of this decree.

Appeal allowed.

Appellate Jurisdiction (a)

Special Appeal No. 433 *of* 1863.

VENKOPADHYAYA....................*Appellant.*
KA'VARI HENGUSU.................*Respondent.*

No rule of Hindú law precludes the recovery of arrears of maintenance.

The only bar to the enforcement of a purely legal right is the lapse of the time required by the law of limitations to bar the remedy.

Special Appeal No. 29 *of* 1858 is overruled by *Special Appeal No.* 92 *of* 1863.

Regular Appeals Nos. 4 *of* 1860 and 31 *of* 1861 dissented from.

1864. *February* 25. *S. A. No.* 438 *of* 1863.

THIS was a special appeal against the decree of the Principal Ṣadr Amín of Mangalore in Appeal Suit No. 607 of 1862, reversing the decree of the District Munsif of Pattur in Original Suit No. 688 of 1859. The suit was brought by a Hindú widow to recover rupees 240, being the amount of arrears of maintenance for five years at the rate of rupees 48 per annum, and to establish her right to maintenance in future at the same rate. The Munsif dismissed the suit. On appeal the Amín decreed future maintenance at three rupees a month from the date of the plaint; but disallowed the claim for arrears, considering himself bound by the decree of the late Ṣadr Court in *Special Appeal No.* 29 *of* 1858*(b)*.

The defendant now appealed against the Amín's decree for various reasons which it is unnecessary to state.

Srínivásácháriyár, for the appellant.

PER CURIAM:—We dismiss this appeal. So far as we can understand his decree, the Ṣadr Amín appears to have come to a right decision, except, indeed in his refusal to allow the arrears of maintenance claimed by the plaintiff. The Amín rests his decree in this respect on *Special Appeal No.* 29 *of* 1858*(b)*. But that decision was overruled by this Court in *Special Appeal No.* 92 *of* 1863*(c)*. In *Special Appeal No.* 29 *of* 1858, the Judges relied solely on the opi-

(*a*) Present Phillips and Holloway, J J.

(*b*) Mad. Ṣadr Dec. 1858, p. 236. (*c*) 16 June 1863. Not reported.

nion of the senior paṇḍit unsupported, so far as appears, by any cited authority. Subsequent decisions of the late Ṣadr Court—such as *Regular Appeals No.* 4 *of* 1860(*a*) and *No.* 31 *of* 1861(*b*)—either follow *Special Appeal No.* 29 *of* 1858, or rest on the ground that it would be 'inequitable' to give arrears of maintenance save from the time when the plaintiff demanded it, or from the date of the suit. The only bar to the enforcement of a purely legal right is the lapse of the time required by the statute of limitations to bar the remedy. There is no question here of the statute, for the right is a constantly recurring right, and there is no authority for saying that a woman entitled to maintenance must, to obtain the sum to which she is entitled, bring annual actions. If, therefore, the plaintiff had appealed we should have varied the items by awarding arrears of maintenance for twelve years(*c*).

1864. *February* 25. *S. A. No.* 438 *of* 1863.

Appeal dismissed.

(*a*) Mad. Ṣadr Judgments 1861, pp. 33, 35.
(*b*) Mad. Ṣadr Judgments, 1862, p. 29.
(*c*) Act XIV of 1859, sec. 1, cl. 13.
Note.—See *Appeal No.* 2 *of* 1821, 1 Sel. Dec. 275, 277.

Appellate Jurisdiction (*c*)

Special Appeal No. 448 *of* 1863.

ÇRI'NIVA'SAMMA'Ḷ and another............*Appellants.*
VIJAYAMMA'Ḷ and another..................*Respondents.*

No transaction of Hindú law absolutely requires a writing.
A Hindú may make a nuncupative will of property whether immoveble or moveable.

THIS was a special appeal from the decision of G. A. Harris, the Civil Judge of Chittúr, in Regular Appeal Suit No. 54 of 1862, modifying the decree of the District Munsif's Court of Tiruvattúr in Original Suit No. 605 of 1860.

1864. *February* 27. *S. A. No.* 448 *of* 1863.

The original suit was brought by the plaintiff, daughter of one Gópáláchàriyár, who died leaving two daughters, herself and the first defendant, to recover one-half of his moveable and immoveable property.

(*c*) Present Phillips and Holloway, J J.

1864. February 27. S. A. No. 448 of 1863.

The first defendant among other things answered, that her father had previously to his death directed, in the presence of witnesses, that his property should be equally divided between the plaintiff, the first defendant, and the second defendant, the son of the first.

The District Munsif, treating this transaction as a valid gift, in supposed accordance with one of the Paṇḍits of the late Ṣadr Court, upheld the disposition and decreed to the plaintiff one-third of the property.

The Civil Judge modified the decree by awarding one-half, because the transaction, in his opinion, amounted to a will, and could not therefore be enforced; and for this position, he referred to four sections of Strange's *Manual of Hindú Law* (§§ 175, 181, 182, 183).

Sríniväsáchdriyár, for the special appellants, the first and second defendants.

Rájágópáláchárlu, for the special respondent, the plaintiff, admitted that after the decision in *Vaḷḷináyagam Piḷḷai* v. *Pachché*(a) he could not contend that a Hindú was unable to make a valid will. But he urged that as wills were introduced into the Hindú from the English law, the testamentary disposition in the present case must be considered as it would be by English law, according to which it would be void, as not being in writing.

The judgment of the Court was delivered by

HOLLOWAY J. :—The only question upon which we can enter in this special appeal is whether the Civil Judge was right in treating the transaction as void and in distributing the property as undisposed of, in accordance with the rules of Hindú law.

It could not of course be denied, after the decision of this Court at 1 Mad. H. C. 326, following the judgment of the Privy Council, that if Gópáláchâriyâr had in fact made a testamentary disposition, it would prevail against the plaintiff his daughter, and *pro tanto* disinherit her. But it was argued that, as wills are a foreign admixture, this supposed testamentary disposition must be considered as it would be in England; and of course there, by the statute of wills, it would be void. We are quite unable to assent to the ar-

(a) 1 Mad. H. C. Rep. 326.

gument that because a doctrine has been incorporated into the Hindú law, from the law of a foreign country, as a necessary consequence, the whole of the foreign law relating to the subject-matter must be imported with it. As a matter of fact we know that attestation has, within the original jurisdiction of the High Court of Bombay*(a)*, not been held indispensable. Where such introductions take place, so far as it can be done, the foreign matter must be moulded according to analogies derivable from the indigenous law. There is no transaction of Hindú law which absolutely requires a writing. Contracts of every description, involving both temporal and spiritual consequences, may be made orally; and it would be singular if we were to attempt to rule, that all other expressions of will are valid when delivered by word of mouth, but that the expression by a man of his will as to the disposition of his property after his decease, shall be wholly invalid unless reduced to writing.

1864. *February* 27. *S. A. No.* 448 *of* 1863.

So to decide would be to ignore analogy and create anomaly.

We may have our opinion as to the course which legislation ought to take upon this subject; but we are not legislators.

The history of the law of the other countries shews that there is nothing in the nature of the transaction to render writing indispensable, although there is very much ground for thinking that it should be rendered so. In England, the history of wills is complicated by the distinction between real and personal property. The very nature of tenures after the Conquest prevented the testamentary disposition of lands in England, except in one or two places by custom*(b)*. That the ecclesiastical Chancellors altogether defeated the law, is matter of history; and the statute of uses, although wholly failing to accomplish the purpose of its authors, effectually rendered lands inalienable except by conveyance *inter vivos*. This led to the Statute of 32 Hen. VIII, Cap. I, which legalized the disposition by will or testament of a portion of the testator's lands. The construction put upon that statute was that a devise under it must be in writing:

(*a*) *Munckerjee Pestonjee* v. *Narayen Luxmon*, referred to in 1 Mad. H. C. Rep. 328.
(*b*) Com. Dig. Gavelkind.

1864. February 27. S. A. No. 445 of 1863.

but, singularly enough, devises by custom were still made verbally until the passing of the Statute of Frauds(a). Nuncupative wills of personal estate were valid until the 1st Vic. chap. 26(b). The Roman law made no distinction between an ordinary testament in writing and a nuncupative one. The rule is thus correctly stated in a modern work of authority: "Si quis autem sine scriptis testamentum ordinare velit sufficit ut coram septem testibus eum videntibus voluntatem suam palam ut exaudiri ab iis possit et intelligi declaret, quo facto nuncupatum hoc testamentum firmum perfectumque est(c)." Historically, therefore, as well as in the nature of things, writing is no essential to a valid devise.

The finding of the lower Court shows that in this case the testator's acts would have satisfied even the rigid construction put by the Ecclesiastical Courts(d) upon the 19th section of the Statute of Frauds. It is clear that he voluntarily, in the presence of three witnesses apparently summoned by himself, declared the manner in which the property, of which he had an unquestionable right to dispose, should pass after his death. In the absence of any enactment requiring a will to be executed with particular solemnities, we are quite unable to say that this was not an effectual devise; and, reversing the decision of the Civil Judge, we direct that the costs of this appeal be paid by the plaintiff. There will be no costs in the Courts below, in which each party has partially succeeded and partially failed.

Appeal allowed.

(a) Co. Lit. Butler's note 111 b.

(b) The previous exception in favour of soldiers and mariners is continued by sec. 11 of 1 Vic. c. 26.

(c) Warnkoenig *Inst. Jur. Rom. Priv.* § 553.

(d) *Bennett* v. *Jackson*, 2 Phillim. 190: *Parsons* v. *Miller*, cited by Sir John Nicoll, ibid. 194.

Appellate Jurisdiction (a)

Special Appeal No. 504 *of* 1863.

PARRAKEL KONDI MENON............*Appellant.*
VADAKENTIL KUNNI PENNA'.........*Respondent.*

Property assigned by the males of a Náyar family for the support of their females is still family property and liable as such to be taken in execution of a judgment against the káraṇavan.

1864. *March* 12. *S. A. No.* 504 *of* 1863.

THIS was a special appeal from the decision of H. D. Cook, the Civil Judge of Calicut, in Appeal Suit No. 56 of 1863, reversing the decree of the Additional District Munsif of Calicut in Original Suit No. 7 of 1860. The suit was brought to cancel an attachment of certain marumakkatáyam land. The land had been attached in satisfaction of a decree obtained by the defendant against the plaintiff's deceased káraṇavan. The plaintiff alleged that the land was her stṛídhana and had been set aside by the males of her tarawáḍ for her support. The defendant maintained that the land still belonged to the tarawáḍ, and was therefore liable for the debt of the káraṇavan. The Munsif dismissed the suit; but on appeal the Civil Judge reversed the Munsif's decree.

Mayne, for the special appellant, the defendant, contended that in Malabar property could not be legally set aside for the benefit of females generally so as to free it from the debts of the tarawáḍ, and that no custom establishing such exemption was asserted or proved.

Karuṇágara Manavan, for the respondent, the plaintiff.

The Court delivered the following

JUDGMENT:—The Civil Judge has found in this case that in pursuance of a custom which prevails among Náyar families this property was handed over by the males of the family for the support of the female plaintiff, and that it is therefore not liable as fruits of a judgment binding upon the family.

This is clearly bad law. As the káraṇavan could at any time alter the disposition of family-property so made, it is

(a) Present Frere and Holloway, J J.

1864. March 12. S. A. No. 504 of 1863.

clear that it is still family-property, and still liable for a judgment binding on the family. Even however if the family arrangement amounted to a binding contract between the members of the family, such arrangement could in no circumstances have the effect of withdrawing family-property from the execution of a decree binding that property.

The decree of the Civil Judge is reversed and the plaintiff's suit dismissed with costs.

Appeal allowed.

Appellate Jurisdiction (a)

Referred Case No. 4 *of* 1864.

MOHIDI'N SA'HIB *against* KHA'DER SA'HIB.

Notwithstanding Act XI of 1861, all suits instituted since Jan. 1 1862, are to be governed by the provisions of Act XIV of 1859.

1864. March 14. R. C. No. 4 of 1864.

CASE referred for the opinion of the High Court by T. Subannáchári, the District Munsif of Kundapur, zil'a Mangalore, in Suit No. 198 of 1863.

No counsel were instructed.

The Court delivered the following

JUDGMENT:—The question submitted for our decision is "are suits instituted from 1st January 1862, liable to the provisions of Act XIV of 1859, or not?"

Act XI of 1861 extended the time within which suits might be brought, without being affected by the provisions of Act XIV of 1859, until the 1st day of January 1862. All suits instituted since that date are clearly to be governed by the provisions of Act XIV of 1859. We therefore answer the question submitted in the affirmative.

(a) Present Scotland, C. J. and Frere, J.

NOTE.—Act XIV of 1859 sec. 18 provides that "all suits that may be now pending or that shall be instituted within the period of two years from the date of the passing of this Act [4th May 1859] shall be tried and determined as if this Act had not been passed."

Act XI of 1861 enacts that "all suits now pending, or which shall be instituted before the first day of January 1862, shall be tried and determined as if Act XIV of 1859 had not been passed."

Original Jurisdiction.

Crown Case Reserved.

THE QUEEN *against* VENKAṬA'CHALAM PIḶḶAI and another.

Where a witness was at the beginning of the day solemnly affirmed once for all to speak the truth in all the cases coming before the Court that day:—*Held* that he might be convicted, under sec. 193 of the Penal Code, of giving false evidence in a suit which came on that day, although he was not affirmed to speak the truth in that suit after it was called on for hearing, and the names of the cases in the day's list were not mentioned when the affirmation was administered.

CASE stated by Bittleston, J.

1864. March 15.

"Venkaṭáchalam Piḷḷai and Venkaṭaráyalu Cheṭṭi were convicted before me at the last Criminal Sessions of the High Court upon an indictment which charged the former with the offence of intentionally giving false evidence in a judicial proceeding under section 193 of the Penal Code, and the latter with abetting that offence under section 190. It was proved that the second prisoner had commenced a suit in the Madras Court of Small Causes against one Kamala Báyi, which suit was heard ex parte by His Honour Raṅganátha Çástrí, one of the Judges of that Court. Upon that occasion Venkaṭáchalam Piḷḷai, the first prisoner, who was one of the bailiffs of the Small Causes Court, was examined by the Judge and deposed to personal service of the summons in the said suit by himself upon the defendant Kamala Báyi, which was the false evidence charged in the indictment. It appeared, however, that Venkaṭáchalam Piḷḷai, before giving his evidence as to the service of the summons in the said suit, was not solemnly affirmed to speak the truth in that suit particularly; but that, according to a practice adopted for the sake of convenience, he, together with the other bailiffs, about eleven in number, had at the beginning of the day been solemnly affirmed once for all to speak the truth in all the cases coming before the Court that day. It was sworn by the Interpreter, who administers the affirmation, that though all the bailiffs are affirmed at the same time, each one repeats the words of the affirmation; and by the learned Judge, that though the names of the cases in the day's list are not mentioned when the affirmation is admi-

(*a*) Present Scotland, C. J. and Bittleston, J.

1864. March 15. nistered, the bailiffs are distinctly affirmed to speak the truth in all the cases coming before the Court that day. It was objected by Mr. Mayne on behalf of the prisoners that there was no evidence that the first prisoner had been solemnly affirmed in the particular suit against Kamala Báyi and that consequently he could not be convicted under section 193 of the Penal Code. I overruled the objection ; but submit for the judgment of the High Court, the question whether the objection taken by the prisoner's counsel is fatal to the conviction."

Mayne, for the first prisoner, referred to sec. 193 of the Penal Code (" whoever intentionally gives false evidence *in any stage of a judicial proceeding,* or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine"), and to sec. 191 of the same Code (" whoever being legally bound by an oath or by any express provision of law to state the truth, or being bound by law to make a declaration upon any subject makes any statement which is false and which he either knows or believes to be false, or does not believe to be true, is said to give false evidence"). As might have been anticipated, such a case as the present is unprecedented and there is no authority on the subject. But I submit that to bring the case under sec. 193, every element of the offence must have taken place in a judicial proceeding. Here the solemn affirmation was made at a time when no judicial proceeding was pending. The judge was then merely in Court. No affirmation was made in the suit against Kamala Báyi.

SCOTLAND, C. J. :—Was not the affirmation at the beginning of the day a stage in each of the 'judicial proceedings' which afterwards took place on the same day ?

Mayne. I submit not. The affirmation of the prisoner was altogether extrinsic to the case subsequently called on. At Sessions witnesses are sworn before the Grand Jury. Could they be indicted if afterwards, without being re-sworn, they give false evidence before the Petty Jury ?

BITTLESTON, J. :—In that case they are sworn on the very indictment in the hands of the officer; and they are sworn to tell the truth to the Grand Jury and no one else.

SCOTLAND, C. J.:—You contend that there can be no 'stage of a judicial proceeding' until the hearing before the Court in such proceeding actually commences. 1864. *March* 15.

Mayne. Yes. I also contend that the oath or declaration necessary to constitute the offence of giving false evidence must be a separate and specific oath or declaration in the particular case. Where, as here, there is a mere fractional part of a declaration, that is not sufficient to justify a conviction.

SCOTLAND, C. J.:—How do you define a judicial proceeding?

Mayne. Any step which the Court may take from the commencement of a suit to its termination.

SCOTLAND, C. J.:—Then suppose it was the practice of the Court to take up each case merely for the purpose of administering the oath or affirmation?

Mayne. But here the case had not been taken up at all when the affirmation was administered. The name of the suit against Kamala Báyi was not even mentioned. Suppose the affirmation had been administered a week or a month or a year before the case was called on. Where are you to draw the line?

BITTLESTON, J.:—Then probably the case would not have been in existence; and of course a conviction could not be maintained under such circumstances.

SCOTLAND, C. J.:—Whether the point taken by Mr. Mayne would not have been successful a few years ago, when convictions for perjury were often quashed on objections far less weighty and ingenious—it is not now necessary to consider. We have simply to deal with the words of a section in the Penal Code, and to consider whether the false statement admittedly made by the first prisoner was made under such circumstances as to render him liable to punishment for giving false evidence "in any stage of a judicial proceeding." I may here remark that the mode of administering affirmations shewn by this case to have been adopted in the Small Causes Court appears to be extremely loose, and little calculated to impress the minds of the declarants with the solemnity and sense of caution which should accompany the making of their statements. And

1864. March 15.

although no doubt the affirmants, being officers of the Court are bound to extra caution, still experience shews that officers who, as in the case of these bailiffs, are frequently required to swear or affirm to matters in Court are very apt to lose that feeling of serious responsibility which is regarded as one of the guarantees for veracity. Every precaution should be taken against diminishing the hold on the conscience which an oath or a solemn affirmation is intended and ought always to supply.

The point raised is that to constitute the offence of giving false evidence in any stage of a judicial proceeding, the oath or affirmation must be taken or administered by or to the accused in some stage of such judicial proceeding; and the question in the present case is whether the affirmation was so administered. I therefore asked Mr. Mayne to define "judicial proceeding." His definition, I think, was correct: it is nothing more nor less than a step taken by the Court in the course of the administration of justice in connection with a case pending.

Here the case is that the prisoner at the beginning of the day was solemnly affirmed before the presiding Judge once for all to speak the truth in all the cases coming before the Court on that day for hearing; and the fair construction of this is that as a witness to prove the service of summonses the prisoner was affirmed to tell the truth in each and every case in which he had been concerned, and respecting which the Court should on that day question him. The circumstance of the affirmation and the giving evidence having taken place at some little interval is really more a question of degree than one of principle. Suppose that ten minutes before a case of *A* v. *B* was called on the prisoner had been sworn to tell the truth in *A* v. *B*, surely it cannot be contended that he would not be liable to conviction under sec. 193, if he gave untrue answers to questions put to him when the case was called on for hearing. On the whole I am of opinion that in the present case the affirmation may fairly and reasonably be considered as having been made in a stage of a judicial proceeding.

With reference to the second point—that no affirmation was administered to the prisoner separately and specifically

in the particular suit against Kamala Báyi—I think that the affirmation made at the beginning of the day, that the prisoner would speak the truth in all the cases coming on before the Court on that day, must be held to enure as an affirmation in every case in which the prisoner was on that day questioned. I am therefore of opinion that there is no ground for quashing the conviction. 1864. *March* 15.

BITTLESTON, J. concurred.

Conviction affirmed.

NOTE.—It was stated after the conviction was affirmed, that the practice mentioned in the case had been discontinued in the Small Causes Court.

Appellate Jurisdiction (a)

Regular Appeal No. 70 *of* 1863.

TEMMAKAḶ..*Appellant.*
SUBBAMMA'Ḷ....................................*Respondent.*

All acts of the guardian of a Hindú infant which are such as the infant might, if of age, reasonably and prudently do for himself, must be upheld when done for him by his guardian.

Such a guardian may bind his ward by referring to a pañcháyat of their caste a question of customary partition.

Where a Çúdra died leaving two wives one with an only son an infant and the other with two sons:—*Held* that the guardian of the infant might refer the question whether the deceased's estate should be divided according to *patní-bhága* or *putra-bhága.*

THIS was a regular appeal from the decision of R. R. Cotton, the Civil Judge of Madura, in Original Suit No. 39 of 1862. The suit was brought under secs. 297 and 299 of Act VIII of 1859, by Subbammáḷ, the senior widow of Karuppan Cheṭṭi, and mother and guardian of Santi Virana a minor, her only son by Karuppan, for the value of one moiety of her deceased husband's money and lands, against Temmakaḷ, the junior widow and mother of two sons by Karuppan, and others, who had taken possession of the property of the deceased. All the parties were Çúdras. Temmakaḷ contended that as the plaintiff had only one son while she, Temmakaḷ, had two, the latter was entitled under Hindú law to two-thirds and the plaintiff only to one-third. The widows agreed to abide by the decision of a pañcháyat of their own caste, and they and the minor executed a karárnáma to that effect. The pañcháyat was held and an award made that the property should be divided into equal moieties 1864. *March* 17. *R. A. No.* 70 *of* 1863.

(a) Present Phillips and Holloway, J J.

1864. March 17. R. A. No. 70 of 1863.

"in such a manner as to maintain virtue and avoid sin." The junior widow refusing to give effect to the award, the present suit was brought. The defendant set up a will giving her two-thirds, which purported to be by Karuppan, but which the Civil Judge found to be a forgery. The plaintiff's son, a boy of 16 years of age, being in Court, was informed of the nature of the suit and asked whether he would abide by the consequences of his mother's act in suing. He replied that he would be bound by the decision that should be finally passed. The case was then proceeded with, and resulted in a decree that the plaintiff on behalf of her son was entitled to a moiety of the real and personal property of her deceased husband.

Norton, for the appellant, the first defendant.

First, the minor could not be bound by his consent to the pañcháyat or the award, or by any act of his mother. Lord Nottingham said he would never decree an award which should bind an infant*(a)*, and by Hindú law a minor can legally have no will*(b)*.

[HOLLOWAY, J. :—All acts which a guardian does for his ward, and which are such as the ward if *sui juris* might reasonably and prudently do for himself, must be upheld.] The act of the guardian *ad litem* cannot obtain any efficacy from the appearance and assent of the infant in Court.

[HOLLOWAY, J. :—No. But such appearance may be important as enabling the Court to see that the infant is actually under the care of the guardian.]

Secondly. We do not attempt to set up the will, but the evidence adduced by the plaintiff to establish the amount of property possessed by the deceased is merely oral and quite untrustworthy.

Mayne, for the respondent, the plaintiff. An award binding an infant was held good in *Bishop of Bath and Wells* v. *Hippesley(c)*. Even at common law an award will not be set aside on the ground of an infant being party to the submission, where, as here, the party objecting was aware of the infancy when she entered into the reference*(d)*. There is great

(*a*) *Cavendish* v. *Anon.* 1 Cas. in Chan. 279.
(*b*) Sutherland, Dattaka Mímánsá *Synopsis*, 235 note VIII.
(*c*) Cited in 3 Atk. 614.
(*d*) *In re Warner* 2 D. & L. 148 : *Wrightson* v. *Bywater* 3 M. & W. 199 : *Jones* v. *Powell* 6 Dowl. 483.

doubt on the authorities whether, in a case like the present, the deceased's estate should be divided according to the rule of *patní-bhága* or to that of *putra-bhága.* The authorities are collected in 2 Strange's *Hindú Law* pp. 351, 357. Under these circumstances a reference to the members of the caste was not only reasonable, but in accordance with Hindú law: 2 Strange, *Hindú Law,* 79,80,81. The conclusion at which the pañcháyat arrived, viz., that the division should be according to the rule of *patní-bhága,* or, as we should say, per stirpes, agrees with the paṇḍit's opinion cited at 2 Strange's *Hindú Law* p. 351; and Mr. Ellis, *ibid.* p. 357, says that "in many parts of the southern countries, the custom of dividing the property in equal shares to the widows [leg. into as many shares as there are widows] and afterwards equally between the sons of the several venters is so strongly established, that it must be allowed to supersede the general law."

The evidence must be admitted to be merely oral. But what other evidence could the plaintiff produce? The defendant is in possession of the property and the accounts, and has neither furnished her with an estimate nor produced evidence of her own.

Norton replied.

The Court delivered the following

JUDGMENT:—This was an appeal from a decree of the Civil Court of Madura awarding to the plaintiff, on behalf of her minor son, one half of the property of the deceased husband. All was alleged to have been taken possession of by the first defendant, another wife.

The plaintiff alleged that a pañcháyat had awarded to her this share, and this allegation was not disputed by the first defendant, who charged divorce for adultery and other matters, and denied that the property was of the amount stated.

The first objection taken at the hearing was that the guardian could not consent to the arbitration on behalf of the minor. We then said, that all acts of the guardian which were such as the infant might, if of age, reasonably and prudently do for himself, must be upheld when done for him by his guardian. In a case of this kind in which, as the authorities in the second volume of Strange's *Hindú Law* shew, there

1864. March 17. R. A. No. 70 of 1863.

is the greatest conflict of opinion, it appears to us that no more reasonable and plainly beneficial course could be adopted than the reference of this question of customary partition by the person in possession of the property, to the members of the caste of the disputants. It has not been attempted on other grounds to dispute the validity of the award; and we are of opinion that it cannot be impeached on the ground of absence of authority. It by no means follows that because after a long contest, a disputed point of law may after great vexation and expense be decided in favour of a person, that it is plainly to the disadvantage of that person, to have submitted the whole matter of law and fact to arbitrators, who have ruled that point of law in a manner perhaps different from that which would have prevailed at the close of such contest.

As to the great objections made to the appearance of the infant in Court, the Vice-Chancellor Bruce in *Crabbe* v. *Moubery(a)* pointed out that the appearance of the infant in Court is not a mere unmeaning form; and although we quite agree that the act of the guardian *ad litem* can obtain no increased efficacy from the actual assent of the infant, the requirement of the appearance was very proper.

It was very properly conceded that it would be impossible in view of the conduct of the parties, to attempt to establish the will.

As to the amount of property, we have looked at the evidence, and have found that there is evidence upon which the Court might well have come to its present conclusion as to that amount. It is perhaps, like all other oral evidence, not of much value, but the Court must come to a conclusion, and this is the only evidence; for the defendant in possession of the property, and, as it seems, of the accounts, has not thought fit to furnish either estimate or evidence of her own. In these circumstances, it is impossible for us to say that the conclusion of the Civil Judge is wrong, and we dismiss this appeal with costs.

Appeal dismissed.

(a) 5 De G. & Sm. 346.

Appellate Jurisdiction (a)

Special Appeal No. 376 *of* 1863.

CHETTI GAUNDAN..................*Appellant.*

SUNDARAM PILLAI and others......*Respondents.*

Though a plaint has been registered the Court may reject it under Act VIII of 1859 sec. 32, as barred by the Act of limitation.

The contract of hypothecation defined.

When land is hypothecated the contract gives the creditor an interest in immovable property, and the period of limitation for actions on such contract is twelve years under clause 12 of section 1 of Act XIV of 1859.

A creditor suing under such a contract must prove that there was an actual pledge and that the land was part of the debtor's estate at the time of pledge. The decree will then be for sale of the property hypothecated unless the debtor pay the amount due with interest within a period to be named by the Court.

1864. *March* 17. *S. A. No.* 376 *of* 1863.

THIS was a special appeal from the decree of Shaikh 'Abdul Rahimán, the Principal Sadr Amín of Coimbatore, in Appeal Suit No. 218 of 1862, confirming the decree of the District Munsif of Udumálpéttai, in Original Suit No. 281 of 1862.

The suit was brought for rupees 420 due under a document dated the 14th of Vaikási of the year Nala (1856), securing with interest rupees 250, pledging certain land for the payment of the amount, and providing that on non-payment within three years, the land should become the absolute property of the pledgee. The plaintiff also asked that the property pledged might be held liable for the debt. The following is a translation of the document :

" Mortgage-bond executed to Chetti Gaundan son of Chellakumára Gaundan residing in Singarampálaiyam attached to Pollanchy Ta'aluk by us five, Sundaram Pillai, and Venkatáchalam Pillai, sons of Chinnatambi Pillai, and Tirumala Pillai 1, Murugam Pillai 2, and Kristna Pillai 3, sons of Subha Pillai residing in Kanattukadavu of the said ta'aluk on the 14th day of Vaikási, of the year Nala.

" If you ask what : We have mortgaged to you our ancestral property, namely 2½ $\frac{3}{16}$ $\frac{1}{32}$ kánis of land No. 52, called " Dévaráju tope nunjai" ; and "Duruvappaiya nunjai," situated in the said village bounded on the East by Kuppayyan's tope, on the West by Kullan's garden, on the

(a) Present Phillips and Holloway, J J.

1864. March 17. S. A. No. 376 of 1863.

North by Murugappan's tope, and on the South by Singayyan's tope, paying an assessment of rupees 41-11-4, together with the trees thereon. The amount that Sundaram Pillai and Venkaṭachalam Pillai, sons of Chinnatambi Pillai, should, as per bond on stamp paper, pay to you on the third Áni of Savumia (1849), is rupees 100, and that Tirumala Pillai, Muruga Pillai, and Kristṇa Pillai sons of Súbha Pillai, should pay, is rupees 50—Total rupees 150. The amount received by the said Sundaram Pillai, and Venkaṭachalam Pillai, on this date, is rupees 50, and by Tirumala Pillai, Muruga Pillai, and Kristṇa Pillai is rupees 50, making in all rupees 250. We would pay these rupees two hundred and fifty on the 30th Vaikási of Kálayukti (1858), with principal and interest, at one per cent. On failing to pay the amount within the said term, we will sell the land to you for the said amount, present a rázínáma and have the paṭṭá transferred; and thus we have executed this mortgage-bond. (Signed) Tirumala Pillai, Sundaram Pillai, Venkaṭáchalam Pillai, Muruga Pillai, Kristṇa Pillai.

Witness.

(Signed) Ayyávu Pillai, of Kanattukaḍavu, I know.

(Marked) Manjappan, I know.

Written by Timmaiya."

The plaintiff originally brought a suit for the land; but being informed that he could not succeed upon what the Munsif termed his conditional sale, he withdrew that suit by permission, and after three years from the period stipulated for the payment of the money, commenced the present suit.

This suit was dismissed by the Munsif as barred by clause 10 section 1 Act XIV of 1859 and, on appeal, the Ṣadr Amín affirmed the Munsif's judgment.

Ritchie, for the special appellant, the plaintiff. First, the plaint having been registered by the Court could not be rejected as barred. Secondly, The plaintiff's claim is not barred by the Act of limitation, as he seeks a decree declaring his interest in immovable property. Clause 10 of sec. 1 Act XIV of 1859 only applies to suits for money.

George Branson, for the respondents, the first, second, third and fourth defendants. First, The mere act of receiv-

ing and registering the plaint could not deprive the Court of the power expressly given to it by the Civil Procedure Code, sec. 32(a) of taking notice of the Act of limitation. Secondly, This is a suit for money and for nothing else. No interest in immovable property is involved. The plaintiff is not a mortgagee. All that he is entitled to is to have his money back again. Clause 10 therefore applies.

HOLLOWAY J. :—Strictly speaking, no doubt, the contract is not one of mortgage. It is, however, one of hypotheeation—the thing pledged remaining with the pledgor, and the whole of it being subject to the creditor's claim. English law recognises hypothecations in the case of a vendor's lien for unpaid purchase-money(b). At common law the mortgagee of land had not only the possession but absolute property of the land on the debtor's failing to perform the condition. But equity has always regarded a mortgage as redeemable till foreclosure; and in enforcing a lien it gives the debtor an opportunity of barring the mortgage or sale of the property to which the lien extends by paying the amount due with interest by a day named by the Court(c). We need not trouble you, Mr. Ritchie, to reply.

The judgment of the Court was delivered by

HOLLOWAY, J :—We do not think that there is any weight in the objection that, the plaint having been registered, the Court had no longer power to reject the plaint as barred by the act of limitations, for we think that it would be contrary to the plain intent of the Procedure Code, to hold that mere ministerial act of registration deprives the Court of the power designedly given of itself taking notice of the act of limitation. The rejection, moreover, is not to be merely if the plaint is on its face barred, but if the Court shall find it to be barred on questioning the plaintiff. Here the plaintiff had obtained the express permission of the Court to prefer a fresh suit, and the effect of that permission

(a) " If upon the face of the plaint or *after questioning the plaintiff*, it appear to the Court that the subject-matter of the plaint does not constitute a cause of action, or that the right of action is barred by lapse of time, the Court shall reject the plaint. Provided that the Court may in any case allow the plaint to be amended, if it appear proper to do so."

(b) See as to the bar of such a lien *Toft* v. *Stevenson*, 7 Hare 1: 1 D. M. G. 28 : Dart, V. & P. 3d ed. 263 n.

(c) See 1 Seton Dec. 3d ed. 450.

1864. March 17. S. A. No. 376 of 1863.

might, on questioning the plaintiff, have the effect of showing the suit not barred.

We think also that on this plaint, inartificially framed as it is, the plaintiff is entitled to the relief, if any, incidental to the contract upon which he has declared. He asks not merely for the money, but that the property pledged be held liable for the debt.

The substantial question is whether this action is really barred by clause 10, or whether the period of limitation is not years twelve under clause 12 of the same section. The words are, " To suits for the recovery of immovable property or of any interest in immovable property to which no other provision of this Act applies the period of twelve years from the time the cause of action arose." The words " to which no other provision of this Act applies" must be taken to mean any interest in immovable property for which no other provision is specially made, for it would be difficult to contend that section 10 might not primâ facie apply to every interest in immovable property arising out of contract. Clause 12 really applies to classes of interests not touched by clauses 13 and 14 and others of the same kind. If it were otherwise there would be no meaning in the words. We are therefore clearly of opinion that if this suit is for the recovery of any interest in immovable property, it is not barred.

The contract is one of hypothecation and it is thus defined by a modern jurist(a), "Et quia hypotheca constituitur desuper rebus, ideo dicitur jus in re, seu jus reale, vel actio realis, quia per illam non obligatur persona debitoris, sed res, et sequitur fundum et datur contra possessionem." Its remedies seem to show clearly that when land is the subject of the hypothecation, it is necessarily a contract which gives an interest in immovable property, for it is clear that any subsequent sale must be made subject to it.

It is true that it is an accessory right—" Pignus naturâ suâ est tantummodo jus accessorium"(b)—and is of course extinguished when the obligation from which it arises is extinguished. " Pignus naturâ suâ propriâ extinguitur si

(a) Neguzantius cited in Burge's *Commentaries on Colonial and Foreign Laws*, vol. III, 161.

(b) Mackeldey, *Syst. Jur. Rom.* § 304.

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debitum pro quo obligatum erat uno aliove modo plene solvitur(*a*);" and *solvitur* implying any mode of discharge, if this statute, like the statutes of the late king, barred the right and not the remedy, this action would not lie.

We are therefore clearly of opinion that the plaintiff was not barred, because the contract gave him an interest in immovable property; and the case must therefore be remanded for decision to the lower Court, and its decree upon this preliminary point reversed.

It is necessary, however, to give such directions as will prevent the defeating of the statute by merely colourable entries of pretended pledges. So far as the contract is one of hypothecation the remedy of the plaintiff is not barred, but his concurrent remedy of an action for the money lent is clearly barred. No remedy therefore can be given to the plaintiff unless he proves, first, that there was an actual pledge, and secondly, that the land was part of the estate of the debtor at the time of pledge; and if this is so, the proper decree will be for sale of the property hypothecated, unless the debtor pays the amount due with interest within a period to be named. The Civil Procedure Code provides ample securities that the decree shall not be made the instrument of a joint fraud by the creditor and the debtor upon third parties. The costs of this appeal will be costs in the cause.

Appeal allowed.

(*a*) Mack. *Syst. Jur. Rom.* § 327.

NOTE.—See *S. A. No.* 365 *of* 1863, 1 Mad. H. C. Rep. 460.

Appellate Jurisdiction (a)

Regular Appeal No. 73 *of* 1863.

CHALAKONDA ALASA'NI..............................*Appellant.*
CHALAKONDA RATNA'CHALAM and another......*Respondents.*

The ordinary gains of science are divisible when such science has been imparted at the family expense and acquired while receiving a family maintenance.

***Secus* where the science has been imparted at the expense of persons not members of the learner's family.**

The trade of prostitution is recognized and legalized by Hindú law.

1864. *March* 17. *R. A. No.* 73 *of* 1863.

THIS was a regular appeal from the decree of C. Collett, the Civil Judge of Vizagapatam, in Original Suit No. 4 of 1863.

The plaintiff, who was a dancing-girl, sued for the recovery of certain gold and silver jewels, house-utensils, and other articles of personal property, to the value of rupees 1,026-6-4, in possession of the defendants, who were also dancing-girls. The plaintiff in her plaint set forth that she adopted the first defendant when the latter was only three years old; that the plaintiff expended a considerable amount in educating her in singing and dancing; that the first defendant and her daughter the second defendant wrongfully possessed themselves of the property of the plaintiff, who, as head of the undivided family, to which the parties belonged, was alone entitled to the possession, control and management of such property.

The defendants pleaded that the property sued for was their own and acquired by their own art, skill and exertions, and that the plaintiff was in no way entitled to any part of the same.

The issue settled by the late sub-judge of Vizagapatam was as follows:—

" The material issue of facts averred by the plaintiff and denied by the defendants is whether the defendants illegally withhold from her her property to the value specified."

Subsequently, on this suit being transferred to the Civil Court, the plaintiff, by her pleader, contended that

(a) Present Phillips and Holloway, J J.

such issue did not include the whole matter in dispute between the parties, inasmuch as, the family being undivided, the plaintiff, as admitted head of the family, was entitled, so long as the state of undivision lasted, to at least the possession, control, and management of the property. The defendants by their pleader stating that they joined issue with the plaintiff upon this question of law, the following additional issue was settled by the Civil Court.

" Whether, according to the law governing the caste of dancing-girls, the plaintiff, as head of the family, is entitled to the possession, control and management of the property in the plaint mentioned, however and by whomsoever of the parties to this suit it was acquired ?"

The Civil Judge delivered the following judgment.

"1. This is a suit between women of the dancing-girl caste for the recovery of personal property consisting of gold and silver ornaments, clothes and household utensils. The case resolves itself into two questions as set out in the issues settled, one of fact and the other of law. Under the former the defence is, that the property is the separate and self-acquired property of the defendants.

" 2. The first defendant is the adopted daughter of the plaintiff, and the second defendant is the daughter of the first defendant. It is of course well known that prostitution, within certain limits, is one of the means by which women of this caste gain their livelihood. But they have also honest means of living, since they are professional singers and dancers ; and no doubt much property is often acquired in this way by women of this caste. It is true that in any such suit as the present a court may generally be correct in surmising that part at least of the property in litigation consists of the profits of prostitution. But then it must not be forgotten that such prostitution is strictly in accordance with Hindú law and customs ; and these women compose a distinct caste, numerous and not seldom possessed of wealth : they do not adopt their profession from choice, but it is their's by the accident of birth, and it is one, as I said, in accordance, and not at variance, with Hindú law. Our courts are, therefore, bound to administer to them that law, uninfluenced by any fastidiousness founded upon

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Western views of morality. No objection has been raised in this case as to the immoral source of the present property, and I am not called upon to seek any. If, therefore, the quantity of the evidence produced, or the perplexity of the questions of law to be solved, should require an extended discussion, I shall not feel myself called upon, in this more than in any other case, to apologise for the length of my judgment merely by reason of the smallness of the amount involved, or the social position of the parties interested.

"3. Numerous witnesses were examined on both sides, but I think that no other evidence was produced."

[The learned Civil Judge, then, in this and the following four paragraphs of his judgment analysed the evidence, and decided the first issue against the plaintiff.]

"9. Before I go to the second issue, I may say that I find as a fact that the first defendant was educated by the plaintiff, and that she paid the masters for instructing the first defendant in singing and dancing. I think that this is the only conclusion consistent with the evidence and the probabilities of the case. I am not, though, satisfied that the second defendant was professionally educated at the expense of the plaintiff. I think it more probable that she was educated at the expense of her mother, the first defendant. But, according to my view of the question of law in the second issue, it is not necessary for me to distinguish, even if the evidence would allow it, (which it does not) between the acquisitions of the first and second defendants respectively.

"10. The contention for the plaintiff upon the second issue was, in effect, that, even assuming the articles to have been separately acquired by the defendants, still they would have been acquired by them by a science or art learnt in the family and exercised whilst they lived jointly as an undivided family ; and that, therefore, the plaintiff was entitled, as head of the family, not indeed to an absolute property therein, but still to the possession, control, and management thereof, being family property, as long as the family remained undivided ; and that so she would be entitled to the decree of this court.

"11. Now I will clear the case at once by saying, that if this is a correct statement of the Hindú law generally, it is equally applicable to the present case. I take it that the caste to which these parties belong is governed by the ordinary rules of Hindú law, except only so far as the absence of marriage and the descent in the female line may vary them; and clearly these specialities of the caste do not affect the present case. Next, I may say that as this is not a suit for partition, I shall not refer to, nor consider those texts of Hindú law which relate to the appropriation of clothes and personal ornaments upon a partition.

"12. What, then, is the ordinary rule of Hindú law as to the rights of one member of an undivided family in respect to property separately acquired by another member by means of his own learning, science or skill in any art or profession? I may, I think, state as a preliminary proposition, which will not be questioned and does not need the citation of authorities, that if such property would, on a partition taking place, not be liable to division among the other co-parceners, then neither could he who had acquired it be compelled, though the general state of union continued, to place such property in the possession or under the control and management of any other members of the family, though that member might be the head of the family, and entitled to the possession and control of the joint property of the family.

"13. The first texts of the law to be considered and the foundation of all the disputes of subsequent commentators are, as usual, to be found in Manu. Those I shall use for the purposes of this case are the 206th and 208th çlokas of the ninth chapter of Manu. In Sir William Jones's transation they are as follows:—

"206. Wealth, however acquired by learning, belongs exclusively to any one [*of them who acquired it*;] so does any thing given by a friend, received on account of marriage, or presented as a mark of respect to a guest.

"208. What a brother has acquired by labour and skill, without using the patrimony, he shall not give up without his assent; for it was gained by his own exertion."

"14. Now, if I were uninstructed by the remarks of Hindú commentators, I should say that these verses contain a

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very clear, distinct, and highly equitable rule. They certainly follow two rather obscure çlokas, the 204th and 205th, which might and probably have afforded the commentators the ground for their subtle distinctions; but the use of the word "however" in çloka 206 separates and excepts the rule they contain from the preceding çlokas. The original of the 204th and 205th çlokas would seem to be obscure, and I do not understand why there should be supplied the very important words which are printed in italics in Sir William Jones's translation, and which are merely a gloss by Kullúka Bhaṭṭa, and are not to be found in the original of any of the many copies and manuscripts of Manu collated by Sir William Jones. The context, and especially what follows in çlokas 206 and 208, would have led me to supply very different words.*(a)* The case supposed by Manu in çloka 204, is that the father dies and then the elder brother becomes head of the family, and as such acquires property, and then Manu says that on partition the younger brothers shall take their shares if they have made due progress in learning. Clearly it seems to me this is merely the principle of Hindú law which we recognise at the present day, excepting of course the impracticable condition about learning—that is, like the direction about the virtuous and learned Bráhmans among whom a king is to distribute the estate of an heirless Bráhman, one of those moral conditions or directions to be expected in the writings of so early a lawgiver as Manu, but which no court could now-a-days notice or enforce. Accordingly we retain the rule without the condition, and we hold that, however praiseworthy may have been the conduct of the elder brother, yet that, as he was simply the head of the family, acquisitions by him in that capacity are family property and liable to equal division. Then comes çloka 205, which is simply that a family of undivided brothers labouring jointly and acquiring pro-

(*a*) 204. 'After the death of the father, if the eldest brother acquire *wealth by his own efforts before partition*, a share of that *acquisition* shall go to the younger brothers, if they have made a due progress in learning;'

205. 'And if all of them, being unlearned, acquire property *before partition* by their own labour, there shall be an equal division of that property *without regard to the first-born*; for it was not the wealth of their father: this rule is clearly settled.'

207. 'If any one of the brethren has a competence from his own occupation, and wants not the property *of his father*, he may debar himself from his own share, some trifle being given him as a consideration, *to prevent future strife.*'

perty shall on partition divide it equally. I omit here also the gloss of Kullûka Bhaṭṭa, and the condition about learning, and I say that this is simply the rule of the present day. If this is a right view of çlokas 204 and 205, then the introduction of the proviso or exception in çlokas 206 and 208, is well-timed, clear and sensible, and nothing but the industry of Hindû commentators would have led me to believe in there being any obscurity or subtilty about the rule of law.

"15. I shall now pass to the commentators, and, first, I shall take the Mitâksharâ, as it is the book of highest authority in this part of India. Section IV of Chapter I is the portion of the book to be referred to. In that section, clause I is the text of Yâjñavalkya (II, 118, 119*(a)*) which is clear enough: he says, " Whatever else is acquired by the co-parcener " himself, without detriment to the father's estate, as a pre- " sent from a friend or a gift at nuptials, does not appertain " to the co-heirs, ... nor what has been gained by science." It is the commentator who succeeds in making the text obscure,—in Clause 6 he says you must read the words "without detriment to the father's estate*(b)*" after each member of the text, and, therefore, only what is gained by science without use of the father's goods is exempt; and what is earned by science acquired at the expense of ancestral wealth must be divided, that is to say, is joint family property. There is an ingenious discussion in Clauses 7, 12, 13, 14 and 15 as to whether there could be a gift acquired with detriment to the father's estate. The commentator in Clause 8 quotes the text of Nârada, " He who maintains the family " of a brother studying science shall take, be he ever so " ignorant, a share of the wealth gained by science," and also a passage from Kâtyâyana giving a definition of what some other commentators call the technical gains of science, namely, " Wealth, gained through science which was ac- " quired from a stranger while receiving a foreign main- " tenance, is termed acquisition through learning." Then in Clause 10, he quotes the above çloka 208 from Manu, and thinks it implies the same condition, though I should cer-

(*a*) 118. Pitṛdravyâvirodhena yad anyat svayamarjitam
maitram audvâhikaṃ chaiva dâyâdânâṃ na tad bhavet.
119. Kramâd abhyâgatam dravyam hṛtam abhyuddharet tu yâḥ
dâyâdebhyo na tad dadyâd vidyayâ labdham eva cha.

(*b*) Pitṛdravyâvirodhena.

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tainly have said that the very position of the words "nor what has been gained by science," at the close of the texts both of Manu (according to the reading of the çloka in the Mitákshará and Yájñavalkya, and its being a disjoined separate sentence, showed that though those lawgivers guarded against the use of joint property where it was possible to have been used in the acquisition, they viewed, and therefore spoke of what was gained by science as a case in which joint property could not possibly be used, or to employ the words of a note to clause 8, they viewed the gains of science as "not naturally liable to partition." In fact they stated in simple language the equitable doctrine, that what a man gains purely by his own learning, skill or ability, belongs to him alone. I think that we shall see how entirely analogous this is to the rule of law as to other acquisitions. And here I will take leave to say that, so far as my own reading of the sources of Hindú law has extended, I have ever found that it is in the text of the earliest Hindú lawyers that the most equitable rules are to be discovered, stated in simple and inartificial language) no doubt, but still clearly and succinctly. Often indeed injunctions or qualifications of a religious or moral nature are mingled with the legal matter of which alone a modern court takes notice ; but it is only when we come to the commentators that we find anomalies [and subtilties imported into the, generally, highly equitable and not very intricate Hindú law of property. If, therefore, I seem to question sometimes the reasonableness of the glosses of a commentator, it is because I conceive that this court is bound to search out, and ascertain for itself, from among the sources of Hindú law, the principles of that law ; and when commentators are not in accordance with ancient texts, or differ, as they often do among themselves, it needs must be that this court should decide according to the weight of authority, the support of analogy, and the reasonableness and equity of the rule.

"16. In the Dáyabhága the discussion of this subject of self-acquired property is much more lengthy. It extends throughout Section 1 of Chapter VI and up to article 20 of Section 2. Though stating the general rule and giving the reason as to self-acquired property, viz.: that it is the gain of a man's own labour without the use of the common pro-

perty or any corporeal effort on the part of the co-parceners (section 1 article 4 and articles 21, 26 and 30). Jímúta Váhana takes the extraordinary distinction as to learned and unlearned co-heirs, holding that those of equal or greater learning are entitled to a share (articles 6, 9 note, 16 and 17), though he expressly in article 19 limits this right to share to the gains of science, excluding even learned co-heirs from sharing in any otherwise self-acquired property. This is, of course, a distinction of so entirely a fanciful, inequitable, and impracticable nature that no modern court could notice it. The result therefore is that the distinction must be rejected and the learned co-heirs be equally excluded with the unlearned in sharing in the gains of science.

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"17. There are also cited in articles 5, 10, 12, 35 and 50 texts from Vyása, Nárada and Baloka (which seem to me to be as simple and explicit as those of Manu and Yájñavalkya) that wealth acquired by science is not subject to partition, that is, is not joint property. And it appears to me that the reason of the rule as to self-acquired property being indivisible given in such passages as articles 21 and 26 shows that it is the use of the joint property in the acquisition of the property, and not in learning the science, that is regarded; that is, it is the proximate and not the remote use of joint property that the law has to look to. If this be so, the rule is consistent with the analogy of the law in other matters. This seems to me much supported by what is laid down in articles 47 and 48, that the mere fact that one brother has been nourished up and maintained out of the common stock is not such a use of joint property as will make all his subsequently self-acquired property liable to division.

"18. Articles 1 to 19 of section 2 are occupied with examples of what is a gain by science, such as a reward for superior skill in reading and so on. But the only article I shall quote for the purpose of this suit is article 11 "also "what is gained by painters, goldsmiths and artists through "skill in the arts and so forth * * all this is exempt from "being shared with the rest of the co-parceners," that is to say, is not joint property.

"19. I shall next go to Jagannátha's Digest. I think the discussion of the subject is confined (I believe entirely

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so) to pages 332 to 372 of volume 3. As usual it is a jungle of texts, objections and solutions. I have certainly travelled through the mass, but at places the commentary is so misty, that I cannot be sure that I have everywhere seen the path.

"20. Though the comment of Jagannátha is as usual wanting in any order of arrangement, perhaps it will be as well that I should follow the order of his pages. He cites the before mentioned texts from Manu, Vyása, and Kátyáyana, and from the last named gives some texts which seem to me merely examples of acquisitions by learning (page 334). Then at page 336 Jagannátha states that what is gained by painters, goldsmiths and the rest through superior skill in *liberal or elegant* arts is exempt from partition ; adding that the meaning is, that wealth gained by superior attainments in any *art or* science belongs exclusively to him who acquired it. Again at page 338, he says the law is likewise the same in regard to the science of music and the like. "In fact," he says (page 339), "in all cases whatsoever wherein "superior skill is required, the wealth gained is technically "denominated the acquisition of science ; otherwise it is "simply wealth acquired by the man himself. Such is the "full sense according to Chandeçvara and the rest."

"21. In the same page he uses language equally strong and explicit in commenting on çloka 208 from Manu. In fact I think that it will be found that it is only on the authority of Kátyáyana that he limits the acquisitions of learning by rules which would not be applicable to other self-acquired property. Jagannátha seems to me ever to struggle to reconcile all texts with each other, and thus to be driven into all sorts of subtleties and obscurities. But even these texts of Kátyáyana he is obliged once or twice to admit are not universally received. Thus he quotes the text before given from Kátyáyana and also at page 340 another to the effect that wealth shall be partible if it was gained by learned brothers who were instructed in the family by their father, or by their paternal grandfather or uncles; but he adds at page 341, "Some lawyers reply, brothers cannot claim a share of *of property so acquired.*" Again he seems at page 350 to oppose to Kátyáyana the different opinion of other lawyers and to lay it down that wealth the acquisition of science gained without using the patrimony is not subject to partition.

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"22. Of course one acquiesces in such a rule as is stated at pages 348-9, that the joint property must not have been used during the acquisition; and the same rule at page 351, with the addition that it is no objection that food and apparel were received out of the joint property during the attainment of knowledge, provided the common stock was not used during the acquisition. And again at page 358 it is said, "In fact participation is only proper when the joint stock has been used;" and at page 360 the reason of the rule for partition is rightly stated to be "the cause is the aid received from the joint stock." All these rules are entirely consistent with the rules as to other self-acquired property. At page 354 it is well observed that wealth acquired by agriculture or the like is not subject to partition merely because he who acquired it "was nurtured with much food provided out of the common stock," and that to introduce a different rule as to the acquisitions of learning would be a disparagement to science." Certainly a man needs to be taught the art of agriculture or the trade of a kómaṭṭi as much as a nách girl requires to be taught dancing and music. If the one is not, on account of his having been maintained and instructed out of the family-property, to have his subsequently acquired property subjected to partition, I do not understand why the other should not be equally free.

"23. In short, not to be tedious by making other quotations, I am satisfied, after a careful perusal of the 30 to 40 pages of Jagannátha's commentary, that it is only on the authority of these two texts of Kátyáyana that any limitation can be applied to property acquired by learning which does not exist in respect to other self-acquired property. It seems to me that the texts from all the other sages of the law are capable of being understood in a manner entirely consistent with the general rule as to self-acquired property. It is when Jagannátha attempts the impossible task of reconciling Kátyáyana with others that he becomes misty, and takes refuge in his wonted formality of an objection with a more obscuring solution. I prefer to reject the dictum of one sage of the law when I find it irreconcilable with that of other sages and inconsistent with the general analogy of the law. If one result of my view of the law, should be, that a Hindú who

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enters the legal or medical profession, will not be liable to divide with his brothers what he may gain by his own industry and abilities, merely because his father paid his college fees or the value of the stamp on his diploma, I certainly shall not be frightened from my position by the consequences of the rule.

"24. I ought perhaps to remark that the text of Nárada, "He who supports the family of a brother employed in "the acquisition of science, shall even though ignorant, re-"ceive a share from the wealth obtained by means of such "science" does not seem to me to oppose my view, as it appears to be simply the statement of a special case in which it would seem highly equitable that in return for considerable assistance the brother should receive a recompense ; though perhaps in the present day it would be rightly regarded as a rule rather of moral than legal obligation. The general rule as stated by Nárada is clear and unqualified, viz., "wealth gained by valour, property received with a wife, "and the gains of science, these three are indivisible."

"25. The Dáya-krama Sangraha is very brief on this subject, and where it differs from my view, as in Chapter IV. Section 1, articles 7, 11, 21*(a)*, it is entirely on the authority of the two texts I have cited from Kátyáyana, and even the former of these is called "a special rule stated by Kátyáyana." The modern text book, the Vyavahára Sára Sangraha, according to the French translation by M. Sicé, page 188-9, sums up the general rule in accordance with my view, though the special text of Kátyáyana is afterwards added*(b)*.

(*a*) Wealth however acquired by science, and such other means, without the use even of joint-funds, must be shared with parceners equally or more learned, not with less learned, or unlearned parceners. The text of Kátyáyana declares: "No part of the wealth which is gained by science, need be given by a learned man to his unlearned co-heirs ; but such property must be yielded by him to those, who are equal or superior in learning.

But all the parceners, whether learned or ignorant, are entitled to share in wealth which has been acquired by science, imparted to them by their own family, their father and the rest. Vrihaspati says: "Whatever wealth has been earned through valour by brothers, who have derived science from their family, or even from their father, is partible.

"So by (success in) disputation." That is what has been obtained by getting the better of another in an argumentative discussion.

(*b*) *Divers Muni.*—Ne sont pas partageables les biens qu'on a acquis d'un étranger n'ayant pas droit au partage et sans le secours des biens patrimoniaux, soit par les sciences que l'on a apprises, soit par l'exercice d'un art mécanique, soit par sa bravoure, soit en accomplissant un sacri-

"26. As to the European text-writers the weight of authority is decidedly in favour of the rule as I have stated it. Sir T. Strange states the rule thus (vol. I. page 213.) "The "essence of the exclusive title exists in the acquisition hav- "ing been made by the sole agency of the individual with- "out employing for the purpose what belongs in common to "the family;" and at page 214 he says "It seems agreed "that maintenance in the family, during the period of the "separate acquistion, though it contribute to the end is not "alone sufficient to affect it with a joint character, the ex- "penditure for the purpose being incidental." And again page 215, "to take the case out of the rule, where there has "been no conjoint labour, the common fund must have been "directly instrumental." I apprehend that few will dispute that the law as to self-acquired property generally, is here accurately stated. But Sir Thomas Strange continues, "The rule applies to all the various modes by which pro- "perty is acquirable, as agriculture, merchandise, service, "science, and military achievement; with gifts or presents." So that clearly he allows of no qualification or exception.

"27. In the cases in Sir Thomas Strange's second volume there is a note at page 373 by Mr. Ellis who remarks upon the "many minute distinctions and limitations made as to "what is use and not use of paternal estate, so that it ap- "pears to him to be one of the many points left to the equity "of the judge." But curiously enough in the very next case, though Colebrooke approves of the paṇḍit's opinion, Ellis page 376, says, "Had the defendant been educated by the "father the case would have been different, for it must have "been at the expense of the family, had it been so; and in "that case, the acquisitions would by consequence have

fice ou tout autre acte religieux, soit en aidant à l'expiation d'un péché soit en éclaircissant les doutes conçus par des parties contendantes, soit en faisant valoir sa science dans une assemblée pour s'attirer des éloges, soit en triomphant par science d'un individu avec lequel on aurait fait une gageure, soit par le guru-pújа que l'on aurait accompli en qualité de disciple, soit par l'enseignement spirituel, ou par toute autre voie. Ces biens ne sont pas susceptibles d'être partagés.

Ce qu'on a reçu en sus du salaire convenu pour enseigner une science, ce qu'on a gagné par son talent en rendant honneur aux grands, ou autrement, ce qu'on accepte par bonté d'un disciple à l'occasion de l'accomplissement de la cérémonie de l'upanayana ou de tout autre acte religieux, tous ces biens sont considérés comme les produits de la science et ne peuvent être répartis entre les cohéritiers.

Kátyáyana.—Sont partageables les biens que l'on a acquis avec le secours des biens communs, soit par sa science, ou par sa bravoure, ou par l'exercice d'un art mécanique.

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"been family-property." But Sir Thomas Strange adds a quære to this positon; indeed I doubt if the facts in that case were not such that the property would not have fallen within the rule even as limited by Kátyáyana.

"28. I have searched the elder Macnaghten's work, but have found only the general rule stated without qualification or exception at pages 47 to 50 of the *Considerations on Hindú Law.* The younger Macnaghten at page 52 also states the rule generally without exception or qualification, though alluding in a note to Ellis's opinion as to the difficulty of saying always what is a use of the joint stock. In his second volume there are several cases, all stating the rule generally and citing many of the texts I have before given. But there are two cases at pages 153 and 155 which seem entirely in point for our present purpose. In one case one brother had been a taḥṣíldár, and another had been a gumáshta, and in other employments, and each had thus acquired property; and it was held that such acquisitions were their respective separate property. In the other case one brother had obtained a situation by the assistance of his maternal uncle and so had acquired property; and it was held that his brothers could not share in it. At page 167 reply 2 there is certainly an opinion directly opposed to me; but it is upon a suppositious case and not upon the facts of a real case as in the other instances. The words are, "According to the Ḥindú law, any property acquired "by an unseparated brother by means of science, which "science he was enabled to obtain by assistance from his "father's funds, will be participated by his brothers." I can only say that here is a conflict of authority, and to me the weight seems the other way.

"29. Elberling at page 92 merely gathers together the various texts which we have considered more at large. Mr. Strange in section 143 of his *Manual* is certainly an authority against me; he says, "Property acquired by means of any art or science inculcated by parents is accounted to have been obtained by ancestral means, and is viewed as ancestral property, although gained by individual exertions"; but the only authority he cites is the opinion of a modern paṇḍit of a provincial court; and I must take leave to say that I do not feel much influenced by such an

authority. Mr. Strange even adds that this is a subtilty of the law so difficult to apply without violence to equity and expedience as scarcely to be carried out in practice. With great respect for the ability and research of the very learned judge, I take leave to say that it is a mere subtilty, resting upon no sound foundation and opposed to the great mass of authorities on Hindú law; and I regret to observe that upon the mere authority of this section in Mr. Strange's *Manual* it has been thought necessary to introduce a bill into the Madras Council containing a provision on this point. Another modern author M. Boscheron Des Portes (sometime I believe a judge at Pondicherry,) who has also written an admirable outline of Hindú law*(a)* makes no such distinction—he says, pp. 28, 29. "Les biens acquis par un des "associés séparément, avec ses ressources personelles, son "industrie, par exemple, lui appartiennent exclusivement." And then he quotes the case in 2 Strange's *Hindú Law* 374; so that his attention must have been drawn to Mr. Ellis's note, and yet he does not admit his qualification of the general rule; in fact the words "son industrie, par exemple," would seem to have been introduced expressly to exclude it.

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"30. I have not, on searching the reports, succeeded in finding any case exactly in point. There are of course numerous cases on the subject of separate acquisitions whilst the family is in a state of union; but all that can be said is that these cases lay down the rule generally without any allusion to the supposed qualification in respect to property acquired by learning or skill.

"31. I therefore decide the second issue against the plaintiff; and in so doing I am sure that I am laying down an equitable rule and I believe also the rule most consistent with the weight of authority. There is, no doubt, some conflict of opinion; but I think that the true position is that the mere fact of a Hindú having received a professional education at the expense of his family, as for instance from his father, does not render all his subsequent professional earnings liable to be divided with his brothers. I believe that on a due consideration of the authorities the rule of law is not really different in respect to property acquired by learning to what it is in respect to property acquired

(*a*) *Aperçu historique et analytique du droit hindou*. Paris, Durand. 1855.

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by agriculture or by trade. The test is the substantial use of joint property during and for the purpose of the acquisition; if there is none such, then the acquisition does not become joint property.

"32. I shall therefore make a decree in favour of the defendants with the exception of the house-utensils and other minor articles specified; and as the plaintiff has, no doubt, substantially failed in this suit, I think she must pay the defendants' costs proportionate to the value of the property recovered by them."

Sloan, for the appellant, the plaintiff. The consideration of this case involves three points. First, the education of the defendants. Secondly, the acquisition of the property; and, thirdly, the custom and law applicable.

[On the first and second points he contended that the evidence went to shew that the plaintiff educated not only the first but the second defendant, and that the ornaments in dispute were purchased with the proceeds of the plaintiff's own ornaments, as well as from the accretion to the undivided family property gradually made through the joint exertions of its several members.]

Thirdly, supposing even that any portion of the property had been acquired by the first and second defendants, I submit that the mode of acquisition is not such as in Hindú law would preclude a division.

The Civil Judge's decision on the point of law may be briefly summed up as follows:

"Property acquired through means of science is not divisible, though the family property had been expended to enable the acquirer to make the acquisition; and texts of law authorising a division with learned partners to the exclusion of unlearned, cannot, in equity, be applied in practice."

In laying down these propositions, I submit that the Civil Judge has overlooked two material points recognised by Hindú law. 1st. The mode in and object for which science was taught, and 2ndly. The particular description of gain declared not to be partible.

According to the Hindú law authorities cited by the Civil Judge, as I read them, I submit,

I. That when family property is expended for the purpose of the acquisition of knowledge to be thereafter applied for the express purpose of a definite object with the view to gain, acquisitions made through means of science so acquired are divisible.

II. That ordinary gains made by science in the usual pursuits of the several members of the family are divisible; but not extraordinary gains acquired by an individual as a reward for uncommon excellence.

The Bengal and Benares schools do not differ with respect to the law on these points.

The Civil Judge cites *Manu,* chap. IX, çlokas 206 and 208, to shew that wealth acquired by learning, by labour or skill (without using the patrimony), belongs exclusively to the acquirer.

Çloka 205 shews that if all be unlearned and acquire property, the partition must be equal.

In this case the application of these texts must depend on the condition of the parties. The texts 206, 208 have evidently reference to skill employed by the acquirer and not possessed by other members of the family. But when the skill is common to all, çloka 205 would apply; and considering that dancing-girls possess skill common to all, that is the text which should have been applied.

The reasoning in paragraph 14 of the Civil Judge's decree as to çlokas 204 and 205 merely questions the authenticity of the text; and the meaning attached to them is based on the supposition of what the context should be, judging from çlokas 206, 208.

The comments on section IV of chap. I of the *Mitákshará* are based on the foregone conclusion in the preceding paragraph, and are so framed as to be made to support that conclusion by objecting to the words in clause 6. "Any thing acquired without detriment to the father's estate." The genius of the Hindú law specially intends that whatever is acquired in any way through means of the joint property should be subject to division, and therefore the expression objected to would appear to be peculiarly appropriate.

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Clause 15 of the same section has been overlooked, but incidentally noticed with respect to another matter. There Vijnaneçvara cites a text from Vrihaspati and specially relies on it: "All the brothers shall be equal sharers of that which is acquired by them in concert," and this is nothing more than a repetition of çl. 205, chap. IX of Manu.

Jímúta-váhana, in the Dáya-bhaga chap. VI sec. 1, cl. 4, p. 109, explains the reason why wealth not acquired through means of the joint property is not divisible. "Since the patrimony is not used there is no exertion on the side of the others, through the means of the common property." In clause 17 he says the word paternal intends "joint property," and these two texts read in connection with the Mitákshará shew that it is the use of the joint property, or joint labour, which creates the right to share in the acquisition. In clause 15 he is more explicit. "If the family of the brother, who is studying science, be made to prosper by another brother at the expense of his own wealth, or by the labour of his body, then he also has a title to property gained by that science."

In the 17th paragraph of his decree the Civil Judge refers to clauses 47 and 48 to show that maintenance as nourishment does not give a title to share in acquisitions by science; but the Judge has not allowed due weight to a very important passage in both clauses, namely expenditure "having been actually intended for that purpose is a requisite [to its being the cause of the gain]." Now in the case of dancing-girls expenditure is a requisite to the cause of gain. They have to be taught music, to read, to sing, to dance, and other accomplishments necessary to enable them to practice their profession.

In referring to clauses 1—19 of section II of the *Dáya-bhága* the Civil Judge in paragraph 18 observes with respect to cl. 11 that gains by painters, goldsmiths and artists are not divisible; but it is evident from the preceding clauses 1—10 that these gains refer to special presents for superior excellence in some particular respect, and not to ordinary gains.

Jagannátha's Digest III, pp. 35, 36 1st ed. states the particular classes of self-acquisition which are not divi-

sible; and with respect to the acquisitions of science, the author explains at page 41: "In fact in all cases whatsoever, wherein superior skill is required, the wealth gained is technically denominated the acquisition of science; otherwise it is simply wealth acquired by the man himself."

In paragraph 20 of his decree the Civil Judge again refers to painters, goldsmiths, &c., in support of his view; but here also he has not allowed due weight to the principal passage. "What is gained by painters, goldsmiths and the rest through superior skill in liberal or elegant arts; and even that which is gained by victory over another in gaming or the like; all that is exempt from participation with others." Jagannátha's Digest III, 38 1st ed.

Sloan then referred to and commented on the following Hindú authorities.

If support be given during the acquisition of science wealth acquired by science may be divided. *Dáya Krama Saṅgraha*, p. 72.

Definition of wealth acquired by science. *Ibid.* 73—76.

As to property not subject to division, *Viváda Chintámaṇi* p. 249. That property acquired by learning is not subject to division, *Ibid.* pp. 250, 252. But it must have been acquired without aid from the common estate, *Ibid.* Property acquired by science is described, *Ibid.* 252. When the family has been maintained such wealth may be divided.

Definition of wealth acquired by science, *Vyavahára Mayúkha* pp. 86, 87. The law respecting science applies to artisans, *Ibid.* 87. What acquisitions of this nature may be divided. *Ibid.* 87, 88.

As to the European authorities, Sir T. Strange i. 213—215 lays down that associated members may acquire separate property, but the acquisition must be original and independent, and the essence to give exclusive title to it consists in its having been made by the sole agency of the individual without employing the common stock. If the family property have been instrumental to it, it vests in the family.

(a) *Viváda Chintámaṇi*, a succinct Commentary on the Hindú Law prevalent in Mithilá. From the original Sanskrit of Vachespati Miçra by Prossonno Coomar Tagore. Calcutta, 1863.

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To render it divisible the family property must have been used for the purpose with the view of making such acquisition. But he distinctly states that ordinary accretions to the common stock are divisible without regard to what each contributed, p. 213.

Mr. Ellis at 2 Strange's *H. L.* p. 373 considers the question as a matter of evidence, but at page 376 expresses an opinion consistent with the view which I take.

Mr. Justice Strange (*Manual* § 143) does not appear to have had his attention directed to the distinctions drawn by Hindú jurists with respect to acquisitions by science through means of property ordinarily expended for education and property expressly expended for that purpose, or to ordinary acquisitions and extraordinary acquisitions made by science.

The elder Macnaghten (*Considerations on Hindú Law* pp. 47—50) states simply the general rule.

The younger Macnaghten I, 52, 53 states the rule generally. Cases in illustration of general rule are cited, *Ibid.* II, 151—156. That acquisitions by joint-labour and joint-funds are divisible, *Ibid.* 161. That acquisitions by science partible if the science have been acquired at the expense of the ancestral property, *Ibid.* 166.

Elberling (*Treatise on Inheritance, &c.*) p. 91 states the general rule and refers to several authorities.

I submit then that since all the authorities support the view I have taken of the law, the property in dispute is divisible, and the plaintiff, as eldest parcener, is entitled to the management.

Sloan then referred to the following authorities:

Prostitute daughters living with their prostitute mother succeed to their mother's property in preference to a married daughter living with her husband. *Tara Munee Dosea* v. *Motee Buneanee,* 7 S. D. A. Rep. 273 cited Morley Dig. N. S. p. 186 and Strange's *Manual* § 363.

As to the adoption of the first defendant, a dancing-girl may adopt a daughter. Strange's *Manual* § § 98, 99.

The daughter is not entitled to share her adoptive mother's property during her life time. *Ibid.* § 116.

The property of a dancing-girl passes first to the female issue, then to the male. *Ibid.* § 361.

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The eldest parcener manages the joint-property. *Ibid.* § 242.

HOLLOWAY, J. :—You have argued your case very well, Mr. Sloan.

Tirumaláchâriyár, for the respondents, the defendants. The first defendant as daughter by purchase could claim no share in the family property, and therefore the family, or the plaintiff as manager of the family, could claim no share in the proceeds of the first defendant's labour. *Appeal No.* 7 *of* 1814*(a).* It is clear from Manu that what is acquired by learning, however imparted, is self-acquisition.

The judgment of the Court was delivered by

HOLLOWAY, J. :—This is an appeal from a decree of the Civil Judge of Vizagapatam, declaring the jewels and other articles the special property of the prostitute daughter and grand-daughter of the plaintiff on the ground that they are part of the gains of science.

In his very elaborate judgment, the Civil Judge has referred to nearly every authority upon the subject; and we feel the more bound to express our thanks for the ample materials for judgment which he has collected, because although with every deference to his opinion, we feel bound to come to somewhat different conclusions.

We are of opinion, with the Civil Judge, that, as this question must be decided by Hindú law, it would not be possible for us to decline adjudicating upon the matter on account of the immoral source from which the gains have been derived. Precedents, not indeed numerous but uniform, have recognized rights of property and of inheritance between the prostitute and her offspring.

The facts of this case are, that the first defendant was brought up to her profession by the family of the plaintiff—singing and dancing were taught her at the expense, either of the plaintiff's sister, from whom the plaintiff subsequently divided, or of the plaintiff herself. The first defendant was

(a) *Mad. Sel. Dec.* I. 85.

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brought up as the child of the plaintiff: she speaks of her as her mother: for a long series of years they have lived as mother and daughter, and for the purposes of this cause must be treated as mother and daughter of an undivided family.

The Mitákshará is in this, as in all other questions of Hindú law arising in these provinces, the first authority to be consulted. The language of the commentator is unusually explicit (sec. 6). "That gained by science without "use of the family-estate is not the subject of partition." The objection to the interpretation is repelled by a distinct text of Nárada. "He who maintains the family of a brother "studying science, shall take, be he ever so ignorant, a "share of the wealth gained by science." The same conclusion must be derived from the definition of wealth gained through science by Kátyáyana, stated by Colebrooke to be an expositor of the highest authority. That definition is "wealth gained through science which was acquired from a stranger while receiving a foreign maintenance, is termed acquisition through learning." It follows that gains of that science, imparted at the family expense and acquired while receiving a family maintenance, are not impartible property.

It must be admitted that it is difficult to reconcile çlokas 204 and 205 with çloka 208 of Manu. Çlokas 204 and 205 seem to render partible the self-acquisitions of brothers living in union after the death of their father; and according to the ancient law and that of Bengal, there seems nothing unreasonable in the provision. At that time division can be enforced, and if they elect to live together there is nothing inequitable in treating their acquisitions as joint

It seems to us that çloka 208 must be read in strict connexion with 207. This provides for a brother with an occupation adequate to his maintenance abandoning all claim to a share. It may well be that with superfluous caution the legislator went on to provide in 208, that the acquisitions of such a brother not being made with family funds, he need not give a share. It can scarcely be supposed that the emphatic expressions "by his own efforts" and "by their own labour" had not reference to what would naturally

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be self-acquisitions but for the fact of the brothers "elect- "ing to live in union after the father's death." The sense scarcely permits the hypothesis that acquisitions by family funds were meant. If this is the correct solution, then çloka 206 will have precisely the meaning attached to it by the commentators, and the three together would read. "The "self-acquisitions of an elder and also of younger brothers "living in union after the father's death will be partible, "but the acquisitions of learning and skill will not be." We do not feel at all confident that this is the correct explanation, and we are doubtful whether a perfectly satisfactory one is possible. The obscure character of these passages would in any circumstances prevent us from overruling by their authority the distinct statements of jurists who have expanded and explained the fragments of Manu who is much more ethical and religious than jural.

Jimúta Váhana(a) sums up the doctrine thus : "Since "it appears from these and other texts that partition does "or does not take place in the case of wealth acquired by "science, valour or the like, according as joint property is "or is not employed." The texts quoted justify his conclusion, which differs in no respect from that of the Mitákshará.

We do not think it at all necessary to examine at length the discussion of the matter in Colebrooke's Digest. The doctrine of the compiler is in accordance with that of the Dáyabhága and the Mitákshará. We will only say that passages are to be found there which seem to point to a distinction between the gains of ordinary learning or valour and the great rewards occasionally obtained by some extraordinary exhibition of either. It is unnecessary, however, to consider whether there is any solid ground for this distinction. We are constrained to say that we feel bound by authority to hold that the gains, at all events the ordinary gains, of learning and science which have been taught at the expense of the family funds, are not impartible. To render them so, the science or learning must have been imparted by persons not members of the learner's family. Although, in deference to the elaborate judgment of the Civil Judge, we have entered upon this discussion, it is in

(a) Dáyabhága cap. VI, sec. I cl. 21.

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our opinion very doubtful, whether upon the facts of this case the question arises. The gains can scarcely be said to be those of music and dancing. They are rather the proceeds of an unfortunate trade, recognized and legalized by Hindú law, and carried on for a long series of years by this family. It cannot be doubted upon the evidence that the ornaments and dresses, with which the business of the first defendant commenced, were the property of the old woman; that they do not now appear in the shape in which the plaintiff wore them, by no means shows that some of them, at all events, were not hers. They may well have been altered and adapted to modern taste for the daughter. The evidence which professes to declare them the specific acquisition of either, is wholly worthless. That on their attachment, the dresses and jewels were found in possession of the daughter and grand-daughter, and the cooking-vessels in that of the plaintiff, is only natural. The witnesses for the défendant have spoken to the receipt by the plaintiff, on partition with her sister, of a considerable sum of money which they allege her to have squandered. It is quite clear, however, that the first defendant was from a child brought up by the plaintiff and her family, and it seems to us that the plain principles of law, no less than common justice, require us to hold this property joint, and the plaintiff, as the eldest member of a joint family, entitled to its possession. No objection, except upon the ground of self-acquisition, has been made, and we are satisfied that that objection, in the circumstances disclosed, is untenable. The decree of the Civil Judge will be varied accordingly, and the defendants will pay the costs both in the Court below and in appeal.

Appeal allowed.

NOTE.—In *Anundrow Gunpet* v. *Bapoo Gungadhur* the High Court of Bombay seemed to think that, as the legislation had discountenanced prostitution by enacting sections 372, 373 of the Penal Code, it was time to withdraw the sanction of the profession of a prostitute which had been given by the decisions in *Tara Munee Dosea* v. *Motee Buneanee* and in Morris' Bomb. Rep. 1851, p. 137.

"With prostitutes, the tie of kindred being broken, none of their relatives who remain undegraded in caste, whether offspring or other, inherit from them (Pro: of Sadr Court, 11th Nov. 1844; S. D. A. VII. 273). Their issue after their degradation succeed." Strange's *Manual of Hindú Law*, 2d ed. p. 89. *Quaere*, if this be law. *Sambandha* or relationship can only be destroyed by the *ghaṭasphoṭana*. Moreover, if it be said that, by Hindú law, a woman loses caste by becoming a prostitute and therefore cannot inherit, Act XXI of 1860 applies. If, then, she *can* inherit, why should not her undegraded relatives inherit from her?

Appellate Jurisdiction (a)

Referred Case No. 5 *of* 1864.

KHWA'JA MUHAMMAD JA'NULA *against* VEṄKAṬARA'YAR and another.

Part-payment, though evidenced by writing, is not in itself an admission of a debt within sec. 4 of Act XIV of 1859.

To entitle a plaintiff to the benefit of a new period of limitation under that section he must prove that the party sued has in writing authenticated by his signature, either in express terms or by reasonable construction, acknowledged and admitted that the debt or a part thereof is due from him.

This signature need not be formally subjoined or added to an acknowledgment written by the debtor, unless it appears from the writing that such signature was intended, or unless the writing would be incomplete in itself as an admission without a signature.

If the body of the admission is in the debtor's own handwriting and contains his signature and was given over by him as complete in itself, it would be an acknowledgment in writing within the meaning of section 4.

1864. *March* 21. *R. C. No.* 5 *of* 1864.

CASE referred for the opinion of the High Court by F. C. Carr, Acting Judge of the Court of Small Causes at Cuddalore.

" This is a suit brought for recovery of rupees 53-12-4, being the balance of the principal and interest due on a bond executed for rupees 28, on the 20th January 1858, by the defendants to the plaintiff promising to repay the debt in three instalments within 12th March 1859.

" It is stated in the plaint that as the second defendant paid rupees 7 on the 19th March 1862, the case is not barred by the statute of limitation.

" The suit as against the first defendant was barred by the statute of limitation, but the second defendant admitted the debt and having himself entered the payment in 1862, of rupees 7 [part of the debt] but had not signed the entry.

"The case was heard before me on the 23rd day of February 1864, and a decree was passed in favour of the plaintiff in accordance with the second defendant's admission, subject to a decision of the High Court upon the following point.

(a) Present Scotland, C. J. and Holloway, J.

1864. March 21. R. C. No. 5 of 1864.

"The case was barred by the statute of limitation against both defendants, unless the entry in the handwriting of the second defendant was sufficient acknowledgment, although not signed by him, to give a new period of limitation according to the provisions of section IV Act XIV of 1859.

"Upon the foregoing facts, I was of opinion that, as the second defendant admitted having written the entry himself, a new period of limitation began from that date, as far as his own liability went.

"The question for the decision of the High Court is

"Whether a new period of limitation begins from the date of each fresh payment of a part of the debt or its interest, although the debtor signs no acknowledgment of the debt nor even the entry (*varavu.*)"

No counsel were instructed.

The judgment of the Court was delivered by

SCOTLAND, C. J. :—The question submitted for our decision is " whether a new period of limitation begins from the date of each fresh payment of a part of the debt or its interest although the debtor signs no acknowledgment of the debt nor even the entry."

It seems to us that part-payment is not in itself, though evidenced by writing, an admission of a debt within section IV of Act XIV of 1859. Looking to the preamble of the Act and its whole frame and scope, it was evidently intended to enact fully the law relating to the limitation of suits; and the express enactments, we think, exclude the effect of part-payment as an acknowledgment.

Before the Act passed part-payment operated, at all events within the Presidency Town, as *an acknowledgment of* a debt to defeat the law of limitation, upon the same principle as that applicable to other acknowledgments since the leading English authority of *Tanner* v. *Smart*(*a*), namely, that it was evidence of a new promise from which a fresh cause of action arose. Now the 4th section of

(*a*) 6 B. & C. 603.

the Act provides expressly for the acknowledgment of debts that would otherwise be barred, and it gives to a written acknowledgment all the effect of a new promise, giving rise to a fresh cause of suit. The reasonable construction of this section, we think, is that a written acknowledgment alone was intended to have that effect, and that impliedly a new period of limitation is excluded in any other case. The legislature must be taken to have had before them the Statute 9 Geo. 4 cap. 14 (extended to India by Act XIV of 1840) and the other limitation-statutes. This construction, we think, is further strengthened by the enactments in section I Clause XIII, and sections 6 and 19 by which part-payment is expressly made to regulate the period of limitation. To entitle a plaintiff, then, to the benefit of a new period of limitation under section IV, he must prove that the party sued has in writing, authenticated by his signature, either in express terms or by reasonable construction, acknowledged and admitted that the debt or a part thereof is due from him. It is not, however, we think, necessary that the signature of the party should be *formally subjoined or added* to an acknowledgment written by himself, unless it appears from the writing that such signature was intended, or unless the writing would be incomplete in itself as an admission without a signature, in either of which cases the additional authentication by the party's signature would be necessary. If the body of the written admission is in the party's own hand and contains his signature and was given over by him as complete in itself, it would, we think, be an acknowledgment in writing within the meaning of section IV.

1864. *March* 21. *R. C. No.* 5 *of* 1864.

Our opinion therefore is that evidence of part-payment without an acknowledgment in writing containing an admission of the debt will not suffice to give the new period of limitation ; but that there may be a sufficient acknowledgment in writing, though the signature of the party is not subjoined or added to the writing.

It should be added that doubts have been felt in the construction of the Act as regards part-payment, which to some extent Mr. Justice Holloway still entertains.

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Appellate Jurisdiction (a)

Referred Case No. 6 *of* 1864.

MA'GAM TIMMAYYA *against* TAṄGATTU'R KANDAPPA'.

A suit cognizable in a Court of Small Causes and for a sum not exceeding rupees 50 may be heard by a District Munsif, though the defendant resides within the local jurisdiction of another District Munsif's Court.

The Munsif hearing such a suit is bound to exercise the powers of a Small Cause Court and to proceed in conformity with Act XLII of 1860.

Madras Act IV of 1863, does not take away the former jurisdiction given to the District Munsif in respect of causes of action arising within the limits of his jurisdiction.

1864. *April* 4. *R. C. No.* 6 *of* 1864.

CASE referred for the opinion of the High Court by J. Ratliff, the Civil Judge of Bellary.

The plaintiff sued in the Court of the District Munsif of Purgi, Zila' Bellary, to recover a debt amounting to rupees 22-2-0. The cause of action arose within the Munsif's jurisdiction, but the defendant resided in Pandruti, within the jurisdiction of the District Munsif of Tandimirri in the same zila'. Three questions were submitted for the decision of the High Court the first of which was:

" Can suits of the nature of Small Causes and in which the sum in dispute does not exceed 50 rupees, be entertained in one District Munsif's Court against defendants residing within the local jurisdiction of another District Munsif's Court?"

It is unnecessary to state the other two questions as the Court held that they were not properly submitted for consideration in this case.

No counsel were instructed.

The Court delivered the following

JUDGMENT:—The suit was properly instituted in the District Munsif's Court as the Court of the lowest grade competent to try it, unless the Madras Act IV of 1863(b)

(a) Present Scotland, C. J. and Frere, J.

(b) Madras Act IV of 1863, sec. 3 enacts, that " all suits of a nature cognizable in Courts of Small Causes when the debt, damage or demand does not exceed in amount or value fifty rupees, District Munsifs in the Presidency of Fort St. George shall have the same powers and shal.

operated to take away the former jurisdiction given to the District Munsif in respect of causes of action arising within the limits of his jurisdiction; and we are of opinion that the Act had not that operation. It alters the mode of procedure and takes away the right of appeal in all suits brought in a District Munsif's Court for less than 50 rupees, which are of a nature cognizable by Courts of Small Causes. In such suits District Munsifs are to exercise "special jurisdiction" under section 3 of the Act, that is, they are to have the same powers and to be governed in all respects by the same procedure as "if they were appointed under Act XLII of 1860."

Where, therefore, a suit is of a nature cognizable in a Court of Small Causes and for a sum not exceeding 50 rupees, it is competent to the District Munsif, and he is bound, to exercise the powers of a Small Causes Court, and to proceed in conformity with Act XLII of 1860. This is the whole effect of the sections giving the "special jurisdiction;" and it is clear, we think, that they do not take away the jurisdiction of a District Munsif to entertain a suit brought for a cause of action arising within his jurisdiction. Our opinion, therefore, is that it was competent for the District Munsif of Pargi to hear and determine the suit. Then, as regards section 6 of the Madras Act, which excludes jurisdiction, we think the case is not within the prohibitory provision of that section.

For these reasons we answer the first question submitted in the affirmative. Upon the other two questions we give no opinion—they are questions not properly submitted for consideration in this case.

be governed by the same rules of procedure as if they were appointed under Act XLII of 1860." Section 6 enacts that "no suit in which a District Munsif is competent to exercise special jurisdiction [*i. e.* 'jurisdiction exercised in conformity with Act XLII of 1860, and the Acts amending the same' sec. I] under section III, shall be preferred in any higher Court unless in cases where the defendant is subject to the exclusive special jurisdiction of a Small Cause Court constituted under Act XLII of 1860, or of a Court invested with the powers of a Court of Small Causes under sections IV and V of this Act."

Original Jurisdiction (a)

Original Suit No. 309 of 1863.

RA'JA' I'ÇVARA DA'S *against* RICHARDSON and others.

The plaintiff sued three executors for the balance due of their testator's simple contract debt of more than three years standing. A part-payment had been made by the defendants within the three years previous to the commencement of the suit. Two of the defendants had also, but during their testator's lifetime, given a personal undertaking in writing to pay the debt out of a fund coming to their hands. The defendants had also signed, as executors, and sent a letter to the plaintiff informing him that they had registered his claim against the testator's estate, and that notice would be given to him when the assets, if any, were to be distributed :—

Held:—First, that the case was not taken out of Act XIV of 1859, by the part-payment, and, secondly, that neither the personal undertaking nor the letter was such an acknowledgment in writing as to bring the case within sec. 4 of the same Act.

Remarks on the English doctrine that part-payment gives the creditor a new period of limitation.

Signature by an agent is insufficient to take a case out of Act XIV of 1859.

1864. *April* 11. *O. S. No.* 309 *of* 1863.

IN chambers, before Bittleston, J., on an adjourned summons for settlement of issues. The plaintiff, as executor of Rájá Kundam Lál deceased, sued the defendants as executors of the late Ghulám Murtuza Khán Bahádur (who died in April 1862) for rupees 63,285-0-5, being the balance due in respect of cash advanced in 1844 and a promissory note at six months dated 4th August 1850, and for interest. A part-payment was admittedly made by the defendants in 1860. Moreover two of them had also (but during the lifetime of their testator) given a personal undertaking in writing dated 4th January 1860, to pay the debt out of monies coming to their hands from the estate of the late Nawáb of the Carnatic. Lastly, in reply to a letter from the plaintiff forwarding to them his account and requesting them to register the same for payment, they had written and sent to the plaintiff a letter dated 4th August 1862, signed by them as executors of Ghulám Murtuza Khán, acknowledging the receipt of the plaintiff's letter, and informing him that his claim had been registered against the estate of their testator, and that due notice would be given to him when the assets, if any, were to be distributed. Three questions accordingly arose, first, whether the part-payment in 1860

1864. April 11. O. S. No. 809 of 1863.

took the case out of Act XIV of 1859, second, whether the personal undertaking by the defendants had that effect, and, third, whether the executors' letter to the plaintiff had the same effect.

The following judgment was delivered by

BITTLESTON, J. :—The first question in this case is whether the part-payment, admitted to have been made in 1860, takes the case out of the operation of the Limitation Act XIV of 1859. Upon this question I have consulted the Chief Justice and Mr. Justice Holloway, before whom the same question had been raised in a special case from one of the Mofussil Small Cause Courts(a); and the conclusion at which we have arrived is that part-payment of a debt has no effect in preventing the operation of the Act as to the residue. The prescribed period of limitation begins to run as soon as the debt is payable; and obviously, the payment of a part of the debt does not in any degree lessen the period, during which the balance has been payable. But according to the decisions of the English Courts since the statute of James, a part-payment has been treated as an acknowledgment of the debt—amounting to or affording evidence of *a new promise* to pay the balance. *Tanner* v. *Smart*(b) *Bateman* v. *Pinder*(c) It is upon this ground only that part-payment has, according to English law, the effect of giving a new period of limitation from the date of the part-payment. But the Indian Act, by sec. 4, expressly gives a new period of limitation in the case of a written acknowledgment of a debt, whilst it is wholly silent as to any such effect resulting from part-payment; though in the Act there are two instances in which the original period of limitation is made to run from the last payment on account (sec. 1 cl. 13 and sec. 6). A reference to the English legislation on the same subject strongly supports the view that the Indian legislature did not intend that payment of part of a debt should give to the creditor a new period of limitation from that time. Before the statute 9 Geo. 4 the decisions had established three modes whereby a case might be taken out of the operation of the statute of limi-

(a) See Supra p. (b) 6 B. & C. 603.
(c) 3 Q. B. 574, And see per Parke B. *Gowan* v. *Forster*, 3 B. & Ad. 50 511.

1864. April 11. O. S. No. 309 of 1863.

tations. These were (as Lord Campbell explained in *Cleave* v. *Jones*(a)) first, acknowledgment by words, secondly, a promise by words, and, thirdly, part-payment; and that statute, providing that no acknowledgment or promise *by words only* should be sufficient for that purpose, and that nothing therein contained should take away the effect of any payment, clearly applied to the first and second modes only, and not to the third: so that when the English legislature took away from parole acknowledgments the effect which had been given to them by the decisions, they expressly reserved the effect of part-payment. Again 3 & 4 Wm. 4. cap. 42 sec. 5 uses language very similar to that of the fourth section of the Indian Act; but it expressly puts acknowledgment by writing and acknowledgment by part-payment on the same footing and gives a new period of limitation from the one as well as from the other.

The statute 9 Geo. 4 was expressly extended to India by Act XIV of 1840, and the Indian legislature must, I think, be taken to have had before them not only that Act but also the other Acts of the English legislature upon the same subject, when they were framing the Act XIV of 1859. With these Acts, then, before them they have expressly provided for the one case of an acknowledgment in writing, giving to that the same effect which it has by the English law, and so doing, have, I think, impliedly excluded every other acknowledgment—an acknowledgment by part-payment just as much as an acknowledgment by words only.

The next question in this case is whether there is any such acknowledgment in writing as to bring the case within sec. 4.

Two documents are relied upon for this purpose. The first a personal undertaking by the Messrs. Richardson to pay the debt out of monies coming to their hands from the estate of the late Nawáb of the Carnatic; but this was given by them in the lifetime of Ghulám Murtuza Khán, and was certainly no acknowledgment by them as his *executors*, in which character they are now sued jointly with their co-executor.

(a) 6 Exch. 573, S. C. 20 L. J. Exch. 238.

Nor, assuming this document to have been given by them at the request of Ghulám Murtuza Khán, their testator, is it an acknowledgment signed by him, within the meaning of section 4. It is not signed by him, and even if the Messrs. Richardsons could for this purpose be treated as having signed as his agents, signature by an agent was held insufficient under 9 Geo. 4 (*Hyde* v. *Johnson*(a)), and must be held equally insufficient under the Indian Act. The Indian legislature has declined in this respect also to follow the course of recent English legislation, whereby the signature of an agent is expressly made sufficient. (19 and 20 Vict. c. 97 sec. 13. See also the 5th sec. of 3 and 4 W. 4. c. 42.)

The other document raises more doubt. It is signed by the three defendants as executors of Ghulám Murtuza Khán, and, in reply to a letter forwarding to them the plaintiff's account and requesting that they will register the same for payment, acknowledges the receipt of that letter and informs the plaintiff that they have registered his claim, and will give him notice of the distribution of assets if there should be any. Now if the English cases since as well as before the 9 Geo. 4. are to govern the construction of the fourth section of the Indian Act, the acknowledgment must be such as to import a new promise to pay, which will sustain the suit. *Cockrill* v. *Sparke*(b), decided upon statute 3 and 4 W. 4. c. 42 sec. 5, is one of the latest cases; and there, though the defendant's letter contained a distinct admission of the debt, it was held insufficient because it was written only to keep alive his liability as a surety in case the plaintiff should receive a dividend out of the estate of the principal debtor and " showed no new contract or fresh liability."

But I do not think it necessary in this case to say, and I decline saying, how far the English cases on this point are to be considered applicable to the fourth section of the Indian Act; for in this case, it seems to me that the letter relied upon does not contain any admission of the existence of the debt sufficiently distinct to bring the case within the

(a) 3 Scott 289. (b) 32 L. J. Exch. 118.

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section. The language is satisfied by interpreting it thus "We have received your claim against the estate of Ghulám Murtuza Khán and registered it as a claim. If there should at any time be assets to distribute, you shall have notice, and then you can substantiate your claim;" and giving it that meaning, it is evidently not an acknowledgment within section 4.

Boyson and Miller, attornies for plaintiff.

Ritchie and Shaw, attornies for defendants.

Original Jurisdiction (a)

ARBUTHNOT and others *against* DAIGRE.

M. chartered a ship to load a cargo at Cardiff and proceed therewith to Madras, the freight to be paid in London on unloading and right delivery of the cargo, one-third by M.'s acceptance at three months from the sailing of the ship (the same to be returned if the cargo were not duly delivered) and the remainder by like bill at three months from the date of delivery in London of the certificate of right delivery of the cargo. The charter-party provided for payment of a commission on the contract, ship lost or not lost, and that £150 should be advanced in cash at the port of discharge on account of the freight against the Captain's draft on M.

The cargo was loaded accordingly, a bill of lading was given for the same, and the ship sailed from Cardiff on the 8th October 1863, M. having consigned the cargo to A. & Co. who carried on business at Madras. On the same day the owners drew a bill on M. at three months for £ 261. 1*s.* 10*d.* being one-third of the freight.

On the 10th October 1863, the general agents in London of A. & Co., advanced to M. on A. & Co's. account and out of their funds £700, received as security for such advance the bill of lading blank-endorsed and forwarded the same bill to A. & Co.

On the 29th October 1863, M. accepted the bill for £261-1-10, and in the following December he suspended payment and the bill was protested.

On the 14th January 1864 the ship arrived at Madras and thereupon A. & Co., as holders of the bill of lading, applied for the delivery of the cargo and offered to advance the £150 in cash pursuant to the charter-party, but the Captain claimed to retain the cargo for the value of the dishonoured bill and the balance of freight due.

Held:—that the terms of the contract were at variance with the right of lien so claimed, and that it was not suspended by the bill nor revived by the freighter's insolvency.

Kirchner v. *Venus* and *How* v. *Kirchner*, *Alsager* v. *St. Catherine's Dock Company* and *Lucas* v. *Nockells* observed upon.

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A special case. The case stated as follows:

The French ship '*Radama*' belonging to Messrs. DeConnick Frères of Havre, and of which the defendant is master, was chartered by W. N. DeMattos of London, on the 12th Sept. 1863, to load a complete cargo of coals in

(a) Present Scotland, C. J. and Bittleston, J.

the East Bute dock at Cardiff and proceed therewith to Madras, under a charter party of which the following is a copy :— 1864. April 20.

" London
Cardiff, 12th Sept. 1863."

Charter Party.

It is this day mutually agreed between Captain J. J. Daigre, owner of the good ship or vessel called the "*Radama*" new ship of 700 tons burthen or thereabouts, now in Penarth Roads whereof he is master and W. N. DeMattos, Esq., of London merchant, that the said ship, being tight, staunch and strong and every way fitted for the voyage, shall with all possible despatch in the East Bute Dock, there load in the usual customary manner in ten days, at any one of the collieries freighter may name, a full and complete cargo of coals which said freighter binds himself to ship, not exceeding what she can reasonably stow and carry, over and above her tackle, apparel, provisions, and furniture, and freighter to name stevedore, and being so loaded shall therewith proceed to Madras or so near thereunto as she may safely get, and deliver the same alongside any craft, steamer, floating depôt, or pier where she can lie afloat, as ordered by the consignee, notice to be given to the agents of the vessel being ready to discharge (the act of God, the Queen's enemies, strike of pitmen, and all and every other dangers and accidents of the seas, rivers and navigation during the said voyage always mutually excepted) *the freight to be paid in London on unloading and right delivery of the cargo*, at and after the rate of 25 shillings per ton of 20 cwt. on the quantity delivered, in full of all port charges, pilotages, Bute Dock wharfage, harbour-dues on cargo and Dover and Ramsgate dues as customary, and such freight is to be paid, say *one-third by freighter's acceptance at three months from the final sailing of the vessel from her last port in the United Kingdom*, the same to be returned if the cargo be not delivered at the port of destination, the freighter to insure the amount and deduct the cost of so doing from the first payment of the freight *and the remainder by like bill at three months from date of delivery at freighter's office in London, of the certificate of right delivery of the cargo agreeably to bill of lading* less cost of coals short

1864. April 20. delivered or in cash under discount at 5 per cent. per annum at freighter's option. The vessel to take time to deliver as customary and the cargo to be discharged at the average rate of not less than 30 tons a working day, weather permitting, or to pay demurrage at the rate of four pence per ton register O. M. per diem, the vessel to be addressed to the freighter's agents abroad free of commission, paying 2 per cent. to freighter in London, and if she returns to London to P. Lowell, to whom the commission of 5 per cent. on this contract is due, *ship lost or not lost.* Any duty which may be levied in consequence of the vessel not being British to be borne by the owner : all claims for average to be settled in London in conformity with the Rules of Lloyd's. £150 *to be advanced in cash at port of discharge on account of this freight, upon customary terms, against Captain's draft on freighter at* 90 *days sight.* The ship and her freight are bound to this venture. The penalty for non-performance of this agreement is to be estimated freight in pounds sterling. In the event of the ship putting into Table or Simon's Bay, the Captain is to address himself to Messrs. Wm. Anderson, Saxon and Co.

(Sd.) J. J. DAIGRE,

(„) W. N. DEMATTOS.

2. A full and complete cargo of coals, amounting to 702 tons, was duly loaded by or on behalf of the said W. N. DeMattos in the said ship in accordance with the charter-party and a bill of lading given for the same dated the 2nd October 1863, of which the following is a copy :—

Steam coal 702 tons. Three tons of coal on board for ships' use, independent of cargo.

Shipped in good order and well conditioned by W. N. DeMattos in and upon the good ship called the *Radama,* whereof is master for this present voyage Daigre, and now riding at anchor in the Port of Cardiff and bound for Madras, 702 tons of Dunraven Merthyr steam coal, which are to be delivered in the like good order and condition alongside any craft, steamer, floating depôt, wharf or pier where the ship can be afloat at the aforesaid port of Madras as the agent of the charterer may direct (the act of God, the Queen's enemies, fire and all and every other dangers and accidents of the seas, rivers and navigation of whatever nature and kind soever excepted) unto

order or to his assigns. The ship to be discharged in regular turn at the rate of not less than 30 tons per working-day, weather permitting, and when required by the freighter's agent such extra quantity as may be practicable, and if not discharged in the time above specified, demurrage to be paid at the rate of *4d.* per ton register per diem, freight for the said goods to be paid by the freighter as per charter-party with average accustomed. In witness whereof the Master or Purser of the said ship hath affirmed to three bills of lading all of this tenor and date, the one of which bills being accomplished the others to stand void. 1864. *April* 20.

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And the said ship, having the said cargo of coals on board finally sailed from Cardiff, which was her last port in the United Kingdom, on the 8th October 1863 and proceeded on her voyage to Madras, where she arrived on the 14th January 1864.

3. On the 10th of October 1863, Messrs. Arbuthnot, Latham and Company of London, (who were the general agents in London for the plaintiffs Messrs. Arbuthnot and Co. of Madras and had general authority from the plaintiffs to advance upon their account on goods consigned to them at Madras) advanced from and out of the plaintiffs' funds, and on the plaintiffs' account to the said W. N. DeMattos the sum of £700 sterling on his delivery to them, the said Messrs. Arbuthnot, Latham and Company as such general agents of the plaintiffs as aforesaid, and on the plaintiffs' account and by way of security to the plaintiffs for the said advance, the said bill of lading for the said coals blankendorsed by the said W. N. DeMattos together with a policy of insurance on the said coals for the said sum of £700, and one copy of the charter-party of the said ship.

4. On the same 10th of October 1863, Messrs. Arbuthnot, Latham and Co. by letter of that date to the plaintiffs, advised them that their account had been debited with the said advance of £700 to the said W. N. DeMattos, and forwarded to the plaintiffs the said bill of lading, and copy charter-party, and intimated that they retained the said policy of insurance on the plaintiffs' behalf.

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5. On the same 10th day of October 1863, W. N. DeMattos, by letter of that date to plaintiffs, advised them that he had dispatched to their consignment through Messrs. Arbuthnot, Latham and Company, the said cargo of 702 tons of coal per *Radama* for sale, and returns on his (the said W. N. DeMattos') account.

6. The said Messrs. De Connick Frères, the owners of the said ship, by their bill of exchange dated the 8th day of October, 1863 drew upon the said W. N. DeMattos for the sum of £261 1*s.* 10*d.*, payable three months after date on account of the freight of the said ship, and their bill was duly accepted by the said W. N. DeMattos on the 29th day of October, 1863.

7. On the 8th day of December, 1863, the said W. N. DeMattos suspended payment, and on the 18th of December, 1863, the said bill of exchange was duly protested for better security.

8. On the arrival of the said ship in Madras, the plaintiffs applied to the defendant for the delivery of the said coals to them, as the holders of the said bill of lading, and expressed their readiness to advance the defendant the sum of £150 in cash at Madras, (pursuant to the terms of the said charter-party) against the defendant's draft, on the said W. N. DeMattos at 90 days' sight; but the defendant refused and still does refuse to deliver up the said coals without payment of the value of the said dishonoured bill of exchange for £261-1-10, and a sufficient guarantee for the due payment in London, according to the terms of the said charter-party of the balance of freight due for the said coals, and claims a lien upon the said coals for such demand.

9. The defendant declined to accept or take, and did not in fact accept or take such advance as aforesaid of £150 or any part thereof from the plaintiffs, and the said ship with the defendant afterwards, and on the 29th day of February 1864, left Madras aforesaid for Akyab.

The question for the decision of the Court is, whether the defendant has any and what lien upon the said cargo for any, and what part of the freight thereof.

(Signed) JOHN BRUCE NORTON.
,, T. SYDNEY SMYTH.

Norton, for the plaintiffs. The question amounts to this: Whether when by a charter-party the freight is to be paid by the shippers at the port of shipment, the owners or Captain can maintain a lien upon the cargo against the consignees at the port of discharge, although in fact the money has not been paid. There is, no doubt, always a lien when it is not waived: but there is a waiver wherever the parties have entered into an agreement inconsistent with the lien. Here the ship-owner has agreed to receive payment from DeMattos of two-thirds the freight in London after the certificate of right delivery at Madras has been received in London. The master cannot withhold the goods from the consignees under such circumstances. Then as to the other one-third when the ordinary time for payment of freight is altered the consideration for the carriage of the goods ceases to be freight and becomes compensation. In the case of freight the ship-owner looks only to his right to retain the cargo; but here he has chosen to look to the personal credit of DeMattos, and as the contract gives no lien, the law will not supply one by implication. Moreover, the inconvenience of establishing such a lien would be serious: per Lord Kingsdown in *Kirchner* v. *Venus*(a). where goods were shipped at Liverpool for Sydney and made deliverable to the shippers' order or assigns he or they paying freight in Liverpool to E. M. who was not the ship-owner, one month after the sailing of the vessel, and it was held that notwithstanding the usage of Liverpool, the master could not detain the goods at the port of discharge on the ground of non-payment of the freight.

[SCOTLAND, C. J.:—Your case is that the agreement for payment by bills in London altered the character of the ship-owner's right from a claim to freight to a claim to compensation. But it may be made a question whether giving the first bill did not merely suspend the right of lien ?]

Norton. The bills are not substituted for payment in Madras, but for payment in London, to which delivery is a condition precedent. The plaintiffs are not DeMattos' agents, but holders for value of bills of lading.

(a) 5 Jur. N. S. 395.

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[BITTLESTON, J. —You say that the plaintiffs were not bound to consider the possibility of DeMattos' insolvency.]

[SCOTLAND, C. J. :—In the ordinary course the plaintiffs could not have heard before the time of delivery of the non-payment at maturity of DeMattos' bill, besides which, the bill might have been paid for honour.] In the *Calcutta and Burmah Steam Navigation Company* v. *DeMattos(a)* (where the defendant was the same and the charter-party was almost in the same terms as in the present case) Blackburn, J. held that as the freight was contingent on right delivery at Rangoon and was all payable in London by the charterers, the ship-owner had renounced all lien for freight. There as here the bill of lading in effect provided that there should be no freight payable on delivery; and under such circumstances Blackburn, J. held that there could be no lien for it as against the assignee of the bill of lading. [*Norton* then referred to *Bjorck* v. *Madras Railway Company*, a case in the late Supreme Court of Madras, of which there is only a newspaper report(b). [BITTLESTON, J. :—That was a case of express contract excluding a common-law lien]. *How* v. *Kirchner(c)*, Tudor's *Leading Cases on Mercantile and Maritime Law*, p. 687.]

[SCOTLAND, C. J. :—The expression in the charter-party in both the cases before the Privy Council " ship lost or not lost" was quite inconsistent with the existence of a lien for freight. Here freight would not be earned unless the cargo was delivered]. Here too, the commission is payable ' ship lost or not lost.' In *Alsager* v. *St. Catherine's Dock Company(d)* Parke B. said " the question is whether payment of the freight is to be contemporaneous with the delivery of the goods, or indedependent of it," and as, in that case the payment was not to take place until two months after the inward report, his Lordship held that the payment was irrespective of the delivery, and that no lien, therefore, existed. In *Lucas* v. *Nockells(e)* *Pollock* for the defendant contended that the plaintiff had no lien because the freight according to the terms of the charter-party was not payable till ten days after the delivery of the goods, and a stipulation as to dealing on credit

(a) 32 L. J. Q. B. 323. 327.
(b) See infra, note to this case.
(c) 11 Moo. P. C. C. 34.
(d) 14 M. & W. 798.
(e) 4 Bing. 729, 738, 741.

is destructive of a right to lien. (*Hutton* v. *Bragg* 7 Taunt 14) And *Campbell*, who was *contrà*, abandoned the claim in respect of a lien. It is true that in *Gilkison* v. *Middleton(a)*, which was followed in *Neish* v. *Graham(b)*, it was held that the shipowners had a lien for freight at Singapore as against the endorsee of bills of lading which stated that the freight was payable in Liverpool, the port of lading, one month from the sailing of the ship. But in *Kirchner* v. *Venus(c)*, Lord Kingsdown stated the principles applicable to such cases, and it is clear law now that when the freight is to be paid by the shippers at the port of shipment, no lien upon the cargo can be maintained against the consignee at the port of discharge, although in fact the money has not been paid. I contend, therefore, first, that as to two-thirds of the cargo, the other side is concluded by decided cases, which establish that when freight is made payable some time after delivery it ceases to be freight, and there can consequently be no lien for it, and, secondly, that as to the remaining one-third the stipulations in the charter-party are inconsistent with the idea of freight.

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[BITTLESTON, J.:—The bill for the one-third became due at three months, that is, at the time when the ship might be expected to arrive at the port of discharge.] Why should different parts of the freight have different characters attaching to them? Consider the inconvenience which would arise in cases where the shipowner has chosen, as here, to take bills at three months from the sailing of the vessel. How could the parties at the port of delivery know whether or not the bills had been paid on the day or subsequently, or whether arrangements had not been made for giving time? Here the bills were due in London on the 11th January, and the ship arrived in Madras on the 14th January—three days after. Is, as Lord Kingsdown asked in *Kirchner* v. *Venus*, the master to withhold the goods from the consignee, till by communication with the port of shipment, all these matters have been cleared up?

[BITTLESTON, J.:—Could the parties have intended that the delivery of the cargo should have depended on the payment or non-payment of the bills?]

(a) 2 C. B. N. S. 134, S. C. 26 L. J. C. P. 209.
(b) 8 El. & Bl. 505 S. C. 27 L. J. Q. B. 15. (c) 5 Jur. N. S. 395.

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Mayne, on the same side.

The defendant relies on the common-law rule as to lien for freight on delivery. That arises only in respect of freight properly so called, and, moreover, it is liable to be divested in case of contract showing an intention that there should be no such lien. All the cases are divisible into two classes, first, those in which the lien was denied on the ground that there was no freight, secondly, those in which it was held that the parties had entered into a contract inconsistent with the existence of the lien. The two cases in the Privy Council establish that it is of the essence of freight that payment should be dependent on the delivery of the cargo. In the other cases the consideration was no doubt freight for which, in the absence of special agreement, there would have been a lien, but the terms of the contract were held to negative the lien as binding the ship-owner to give up the goods antecedent to payment. *Alsager* v. *St. Catherine's Dock Company* and *The Calcutta* and *Burmah Steam Navigation Company* v. *DeMattos* were cases of this kind.

Would there be any lien if DeMattos were party here and not his assigns ? Arbuthnot & Co. are in precisely the same position as DeMattos, and if he were solvent the Captain could claim no lien against him. The mere fact that DeMattos has become insolvent can make no difference. The insolvency merely introduced a new element of risk into the transaction. which might have been guarded against by the contract, but could not alter its nature. No lien would arise as to what was to be paid after notice of arrival; and the question as to whether the lien would not revive on ascertaining DeMattos' insolvency is answered by *Alsager* v. *St. Catherine's Dock Company*, where the charterers had become bankrupt.

As regards the other point, the intention of the parties could not have been that the ship-owner should have a right to withhold the goods till payment, *Pordage* v. *Cole*, which decides that where a day is appointed for payment of money or for doing any other act, and the day *is* to happen or *may* happen before the thing which is the consideration for the money or act is to be performed, an action may be brought

for the money or for not doing the act before performance of the other side of the contract. 1864. April 20.

Then as to the date of delivery. The bills were payable three months and three days after starting, *i. e.* on the 11th January, one day after the first mail, so that, even if the bill had been dishonoured, the news of its dishonour could not have reached Madras till the 20th February. It cannot have been the intention of the parties that the shipowner should have a right to lie in the roads till that day. If this be so in the case of the charterer, *a fortiori* it must be so in the case of the plaintiffs, who are assignees for value of the bill of lading; for such an assignee is free from all equities except those of which he has express notice. Here all the money was to be paid by the charterer and the payment was contingent on and not to be made till after due delivery.

There never can be any claim for lien when the assignee of the bill of lading has express notice that he is not under any circumstances to be called upon for payment. The object of making the bill of lading shew that the assignee can never be called on to pay is to enable the charterer to obtain discount to the full value at the port of shipment; for, if it shewed on its face that on being presented a claim might be made for payment of the freight prior to delivery, the discounter would only advance upon it to the value of the goods minus the amount which he might possibly be called on to pay before he could get possession of them.

On the whole I submit that the remuneration to be received by the shipowner was not freight at all; but that if it was, his common law right to a lien for it has been done away with by the express provisions of the contract.

The Advocate General, for the defendant, conceded that as to two-thirds of the freight the defendant could not maintain a lien: as to the other third he contended that looking to the time the bill actually given had to run the intention of the parties must have been that it should have been paid in London before the cargo was delivered at Madras. He also urged that, admitting the lien to have been suspended, the right revived on its becoming known in Madras that by reason of DeMattos' insolvency the bill

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would not be paid and cited *Mashiter* v. *Buller*(a), *Abbott on Shipping* 275, infra p. 101: *Campion* v. *Colvin*(b), *Christie* v. *Lewis*(c), and *Stevenson* v. *Blakelock*(d).

Mayne in reply.

It is conceded that as to two-thirds of the freight no lien can be maintained, and as to the other third the cases cited do not apply. In *Mashiter* v. *Buller* the bills of lading adduced to prove a special contract that freight should be paid on shipment without reference to the completion of the voyage were held not to do so at all. In *Campion* v. *Colvin* and *Christie* v. *Lewis* the delivery of the bills for the payment of the hire of the ship was a condition precedent to the delivery of the goods. *Stevenson* v. *Blakelock* is not in point: that case merely decides that an attorney's general lien on his client's papers was not extinguished by his subsequently taking the client's acceptances for the balance due to him from the latter. The passage from *Abbott on Shipping* is not sustained by the authorities cited in support of it.

SCOTLAND, C. J.:—This case has been fully argued and I may at once state my opinion. The plaintiffs Arbuthnot and Co. do not stand merely in the situation of consignees and agents of DeMattos the charterer of the ship. They are also, to the extent of the advance made by their agents in London, indorsees for value of the bill of lading, and entitled, I think, under the charter-party to the delivery of the coals discharged of all lien for freight, notwithstanding the insolvency of the charterer.

The result of the decided cases so fully brought under notice I take to be, that the shipowner may be deprived of the right of lien legally incident to the contract of affreightment, by the express terms of the charter-party or bill of lading. The question then for consideration is what as respects freight was the contract entered into between the ship-owners on the one side and the freighter on the other, under the present charter-party and bill of lading?

By the terms of the charter-party to which the bill of lading refers, the freight is made payable in London on un-

(a) 1 Wms. Saund. 320. b. (b) 1 Campb. 84.
(c) 3 Bing. N. C. 17. (d) 2 Brod. & B. 410.
(e) 1 M. & S. 535.

loading and right delivery of the cargo, at the rate of 25*s.* per ton on the quantity delivered. The charter-party then provides as to the time and mode of payment that "such freight is to be paid one-third by freighter's acceptance at three months from the final sailing of the vessel from her last port in the United Kingdom......and the remainder by like bill at three months from date of delivery at freighter's office in London, of the certificate of right delivery of the cargo agreeably to bill of lading." It further contains the stipulation that £150 was to be advanced in cash at port of discharge on account of the freight against the Captain's draft at ninety days. There can be no doubt, I think, as to the meaning to be given to these clauses in the charter-party. They clearly shew that the intention of the parties was that all freight was to be paid in London, and that for the payment of the one-third, the shipowners should look to the security of the bill at three months from the date of sailing and for the two-thirds to the bill at three months from delivery in London of certificate of right delivery at Madras. It cannot reasonably be supposed that the parties contemplated any demand for freight at Madras. The ship might or might not have arrived at the time when the first bill became due; and the second bill was not to be given until *after* delivery of the cargo at Madras; and there is the further circumstance that the charter-party expressly provides that the Captain shall be paid £150 at Madras on account of freight. I think it clear, therefore, that the express contract for the payment of freight contained in the charter-party is quite inconsistent with the retention of the right of lien, upon the cargo, and that the shipowner thereby abandoned such right.

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I do not think it can be said here, as was contended on the authority of *Kirchner* v. *Venus* and *How* v. *Kirchner*, that the payment agreed upon were no longer of the nature of freight, but something in the shape of remuneration or compensation for the carriage of the cargo. In those cases there was no charter-party, and the payments provided for by the bills of lading were to be made so many days after sailing, vessel lost or not lost. Here the right delivery of the cargo was necessary to the earning of the freight. But independently of that distinction, the decision in both cases rests substantially upon the ground of the intention of the

1864. April 20. parties appearing from the terms of their express contract; and so far they are the strongest authorities against the lien claimed by the defendant.

Then as to the other cases. In *Alsager* v. *St. Catherine's Dock Company*, the charterer had become bankrupt, and the Court points out very clearly that the question is entirely one of construction, and that when it is clear from the charter-party that parties intend that there should be a delivery of goods independently of the payment of freight, there the shipowner's lien is completely gone.

In *the Calcutta and Burmah Steam Navigation Company* v. *DeMattos(a)* the charter-party was almost identical with that in the present case. It stated "the freight to be paid in London on unloading and right delivery of the cargo, at and after the rate of 40*s.* per ton of 20 cwt. on the quantity delivered, in full of all port charges, pilotage, Bute Dock, &c. dues; and such freight is to be paid, say one-quarter by freighter's acceptance at three months and one-quarter by like acceptance at six months, from the final sailing of the vessel from her last port in the United Kingdom, the same to be returned if the cargo be not delivered at the port of destination ...... the remainder by a bill at three months from the date of delivery at the freighter's office in London if the certificate of right delivery of the cargo agreeably to the bills of lading"—almost *totidem verbis* with the charter-party in the present case. In observing upon these provisions of the charter-party, the language of Mr. Justice Blackburne, whose opinion in a case of commercial law is entitled to very great weight, is to the effect that, inasmuch as by the provisions of the charter-party, the freight, though contingent on right delivery at Rangoon, was made payable in London; the shipowner had thereby renounced all lien for freight. That observation applies equally to the charter-party in this case. With reference to the cases of *Gilkison* v. *Middleton* and *Neish* v. *Graham* so much commented upon in *How* v. *Kirchner*, I would only observe that the judgment in the former case rested on the terms of the charter-party reserving an absolute lien for all freight; and that as an authority *Neish* v. *Graham* seems to me to be met by the observations in the judgment in *How* v. *Kirchner*.

(*a*) 32 L. J. Q. B. 323.

The Advocate General was driven to contend that, looking to the time the bill had to run, the intention of the parties was that there should be payment of it in London before delivery of the cargo, and that, admitting the lien to have been suspended, the right revived upon its becoming known here that by reason of DeMattos' insolvency the bill would not be paid. And in support of his argument he read the passage from Lord Tenterden's Treatise on Shipping(a) "when the payment is to be made by bills the right of retention continues until they are given, *and would, it is conceived, revive, in case of their dishonour, before the shipowner had parted with the goods.*" I am of opinion that no effect can be given to this argument, and that, looking at the passage cited and the case(b) and dicta(c) on which it appears to be rested, it is clearly inapplicable to the present case. Assuming the right of the shipowner to be as therein stated—and here I need do no more—I think the passage can have reference only to cases where the parties stipulate simply that bills shall be given beforehand for the freight payable at the port of discharge and the bills were either not given or were dishonoured before the delivery of the cargo—cases in which there was no express contract showing that the shipowner had agreed to relinquish the right of lien. Here, as I have already pointed out, the effect of the express terms of the charter-party was altogether to get rid of the shipowner's right of lien. The right in truth never attached, and to allow it to be exercised now would be quite as contrary to the intention of the parties as it would have been if DeMattos had not become insolvent. 1864. *April 20.*

For these reasons I am of opinion that the charter-party precluded the claim of lien on the part of the Captain and consequently that the question put should be answered generally in the negative.

BITTLESTON, J. :—In this case the plaintiffs are entitled to all the advantages of assignees of the bill of lading for valuable consideration. Though they are also agents of the charterer, they are entitled, as such assignees, to receive the cargo, and are owners of such cargo for the purpose of

(a) Ninth ed. by Shee, p. 248.

(b) *Stevenson* v. *Blakelock*, 1. M. & S. 535.

(c) Per Gibbs, C. J. interrupting Lens Serjt. in the argument of *Hutton* v. *Bragg*, 2 Marsh. 339.

1864. April 20. satisfying themselves for the advance made to him by their agents.

The defendant, however, claims to hold the goods, setting up a lien for freight.

The right to such lien may arise either by common law or by express contract.

The common-law right to such a lien rests upon an implied contract arising from the carriage and conveyance of goods; but here the terms of the express contract are at variance with such a right.

The language of this charter-party seems to me to shew that the owners looked not to the goods but to the personal credit of the freighter as the security for the payment of the freight. Neither the charter-party nor the bill of lading stipulates that the consignees are to pay any portion. All is to be paid in London partly by a bill at three months from the date of sailing, partly by bill at three months from the delivery in London of the certificate of unloading and right delivery of the cargo at the port of discharge. These payments are unconnected with the delivery of the goods at Madras, and neither party, I think, could have contemplated making delivery at Madras depend on the fate of bills payable in London. The agreement for delivery of bills in London is clearly inconsistent with the maintenance of a lien at Madras. The argument as to the revival of the lien by DeMattos' insolvency supposes the lien to have once existed, and is answered by *Alsager* v. *St. Catherine's Dock Company,* which is strongly against the defendant. Here there was no special contract to preserve the lien, and nothing to shew that in any contingency the delivery of the goods was to depend on the payment of any portion of the freight. I am of opinion therefore, that the defendant had no right or lien.

Judgment for plaintiff without costs.

NOTE :—Here follows the report, believed to be by Mr. J. W. Branson, of the case of *Bjorck* v. *The Madras Railway Company* referred to *Supra* p. 94.

BJORCK *v.* THE MADRAS RAILWAY COMPANY.

The Advocate General and *Mayne* for the plaintiff.

Branson for the defendant.

This matter came before the Court upon a special case. The facts admitted by the parties were these :—On the 20th January 1860, Messrs

Begbie and Co. entered into a charter-party with the plaintiff, Captain of the Swedish ship "Gotheburg", whereby the plaintiff was to proceed to Sunderland, there take in a cargo of iron, coals and coke, proceed therewith to Madras, and after delivering same at Madras, proceed to Moulmein, there load a full cargo of teak, proceed therewith to such port in the United Kingdom or on the Continent as ordered at Cork or Falmouth, and deliver same on being paid freight for the *entire voyage out and home* £6-15 per load of teak for all lengths of 23 feet and upwards if discharged in the United Kingdom, £7 per like load if discharged on the Continent: two-thirds freight per load for all lengths of 18 feet and under 23 feet, and one-half freight for like load for lengths under 18 feet:—£2,000 to be advanced at coal port on signing bills of lading in charterers' acceptances, one-half at three months and the rest at six months:—freight to be paid in cash (less advances) at two months discount; Captain to have *a lien on the cargo for all freight, dead freight, and demurrage:* necessary cash for ship's disbursements to be advanced at Madras and Moulmein, not exceeding £800.

On the 27th January 1860, Messrs. Begbie and Co., entered into a sub-charter-party with the defendants to convey iron, coals and coke and other merchandize to Madras, and deliver same on being paid freight at 45 shillings per ton with 5 per cent. primage thereon: the freight to be paid ten days after the sailing of the ship, less £200,—to be also paid in London *on receipt of a certificate of the right and true delivery of the cargo* at Madras less also two months discount at the rate of 5 per cent. per annum.

The vessel sailed from Amsterdam for Sunderland on the 8th February 1860. Both charter-parties were effected by brokers.

The plaintiff returned to Amsterdam, after entering into his charter-party, then proceeded to Sunderland: then shipped the outward cargo and signed bills of lading for the same. These bills of lading were first as to the coke, "paying freight for the same as per charter-party." "Second, for the coals, freight for the said goods to be paid and all other "conditions as per charter-party." Third, for the iron, "freight for the "said goods to be paid and all other conditions as per charter-party."

The plaintiff was ignorant of the defendants' charter-party with Messrs. Begbie and Co., and the defendants were ignorant of the charter-party entered into by the plaintiff with that firm. The plaintiff had no direct communication with the defendants; and in signing the bills of lading intended to refer to his charter-party; and on the other hand the defendants in submitting the bills of lading to the Captain for signature, intended to refer to the then charter-party with Messrs. Begbie and Co. The defendants had paid freight upon their charter-party, but whether to the full extent or not was unascertained.

The vessel sailed from Sunderland on the 11th March 1860.

Messrs. Begbie and Co. had given bills under their charter-party for £800 at six months and £1,000 at three months, making, less commission, the £2,000 advance. These bills had not been paid. Messrs. Begbie and Co. became bankrupts on the 25th April 1860.

On the same day, they wrote to the plaintiff to re-charter.

The vessel arrived at Madras on the 29th July 1860. The cargo was landed and delivered to the defendants, on the understanding that both parties should submit themselves to the judgment of the Court. And the questions proposed were, first, whether the plaintiff has any claim against the defendants under the circumstances of this case: and secondly, if so, to what extent.

Mr. Advocate General.—No absolute hiring of ship as in *Paul* v. *Birch* 2 Atk. 621.

Lien not confined to homeward cargo, *Gilkison* v. *Middleton*—26 L. J. C. P. 209 [2 C. B. N. S. 134] *Neish* v. *Graham*, 27 L. J. Q. B, 15. [8 E. & B. 505.]

Defendants should have enquired as to existence of prior charter.—*Small* v. *Moates* 9 Bing. 579.

Doubts thrown upon *Gilkison* v. *Middleton* in *Kirchner* v. *Venus*, 5 Jur. N. S. 395.

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Mayne.—Lien is same as against indorsees or sub-freighters. *Soldergreen* v. *Flight*, cited [in *Hanson* v. *Meyer*] 6 East 622, as it is against charter—unless qualified by bill of lading.

Faith v. *East India Company*, 4 B. & Ald. 630.

Shipper adopts charter-party except so far as controuled by bill of lading—*Foster* v. *Colby*, 28 L. J. Exch. 81.

Though largely in advance, yet lien upheld against consignee—*Gledstanes* v. *Allen*, 12 C. B. 202.

Not altered by the sub-charter—*Small* v. *Moates* [9 Bing. 574]: *Zwilchenbart* v. *Henderson*, 23 L. J. Exch. 234—*Sanders* v. *Vanzeller*, 4. Q. B. 260—*Scott.* v. *Taylor*, 13 East.

Language of bill of lading is that of the Master.

Branson.—Special contract—therefore no common law right of lien. *Kirchner* v. *Venus.*

1st. Charter-party: no lien on outward cargo; the lien clause does not give it—Abbot on Shipping 286.

Birley v. *Gladstone*—3 M. & S. 205.

Foster v. *Colby*—3 Exch. N. S. 707.

No lien in respect of claim for unliquidated damages.—*Phillips* v. *Rodie*, 15 East 547—No lien for dead freight. Plaintiff's claim is for non-performance of covenant to load—In *Gilkison* v. *Middleton* a lump sum was agreed to be paid for freight.

No lien: 2,000£ to be paid in advance at port of shipment.—*Kirchner* v. *Howe*—*Kirchner* v. *Venus.*

2nd—If any lien, it can at all events only extend to what is due by Madras Railway Company on charter with Begbie and Co.—*Faith* v. *East India Company* [4 B. & Al. 630]

In *Small* v. *Moates*, lien attached before alienation of the goods.

Bittleston, J.:—The ship "Gotheburg," whereof the plaintiff is master, has brought from Sunderland to Madras a cargo of coal, coke, and iron, deliverable under bill of lading to the Madras Railway Company or assigns, "he or they paying freight for the same as per charter-party."

There is no question that by the general rule of mercantile law, the owner of the "Gotheburg" would have a lien upon the cargo so carried, for the freight earned upon that voyage, unless either by the charter-party referred to, or by some other document binding him, he has waived the right.

The peculiarity of this case consists in this, that two distinct charter-parties have been entered into with respect to this voyage; the original charterer, instead of shipping goods of his own, having entered into a sub-contract with the defendants, under which the cargo in question (their property) was shipped; that the plaintiff had no notice of the second charter-party, and the defendants had no notice of the first.

Two things seem to me to result from this: first, that in considering the question, whether the plaintiff, representing the ship-owner, has waived his lien for freight, the only documents binding him are the first charter-party and the bill of lading.

And secondly, that so far as the question between them depends upon contract, the defendants can only be bound by the terms of the second charter-party; or, at least, cannot be bound by the terms of the first.

The first question, therefore, which presents itself for consideration, is, whether, with reference to the terms of the original charter-party between the plaintiff and Begbie and Co., there has been a waiver by the ship-owner of his lien for freight upon the outward cargo.

By that instrument it is agreed that the ship shall proceed to Sunderland, there load the cargo in question, and therewith proceed to Madras, and that after delivering the same, she shall proceed to Moulmein, and there load a full cargo of teak, and therewith proceed to some port in the United Kingdom or on the Continent, and deliver the same on being paid freight as follows; *for the entire voyage out and home*, a varying sum per load according to the lengths of the timber and the port of discharge. £2,000 to be advanced at coal port on signing bills of lading, in charterer's acceptance, at three and six months. Freight to be paid in cash (less advances) at 2 per cent discount. *Captain to have lien on the cargo for all freight, dead freight and demurrage.* Necessary cash for ship's disbursements to be advanced at Madras and Moulmein, not exceeding £800.

Now, if I had been called upon to put a construction upon this contract without any light other than that furnished by the language of the instrument itself, I should have come to the conclusion that the intention of the parties was to exclude any lien upon the outward cargo.

But in the case of *Gilkison* v. *Middleton* (26 L. J. C. P. 209), upon a very similar charter-party, the Court of Common Pleas put a different construction: and it seems to me that upon this point, the only question which I have to consider is whether *Gilkison* v. *Middleton* is a binding authority, notwithstanding the observations of the Judicial Committee of the Privy Council in *Kirchner* v. *Venus*, and of the Court of Exchequer in *Foster* v. *Colby*.

It cannot certainly be said that *Gilkison* v. *Middleton* is expressly overruled.

In the case of *Kirchner* v. *Venus*, it was unnecessary for the Judicial Committee to enter into the question whether the Court of Common Pleas had correctly construed the charter-party in *Gilkison* v. *Middleton*. It was enough to say that they had not sufficiently considered the terms of the bill of lading, which afforded the evidence of the contract with the consignees, and that therefore the decision was not conclusive as to the effect of the bill of lading.

In that case the bill of lading made the goods deliverable to the shipper's order or assigns, he or they paying freight for the said goods here, *as per margin* with average accustomed; and in the margin the words were, "freight payable in Liverpool to Æneas McDonnell (not the ship-owner) one month after sailing;—vessel lost or not;" and the Court rested their decision "on the ground that where parties, instead of trusting to the general rule of law with respect to freight, have made a special contract for themselves for a payment *which is not freight*, it must depend upon the terms of that contract whether a lien does or does not exist, and that when the contract made gives no lien, the law will not supply one by implication. For these reasons their lordships were of opinion, that unless the contract in this case could be extended by the usage of the place where it was made, so as to have an effect which in itself it did not bear, the lien cannot be maintained."

Neither in this case nor in the previous case of *Howe* v. *Kirchner*, 11 Moore, P. C. 21, had the Court to deal with any such clause as existed in the charter-party in *Gilkison* v. *Middleton*, and as exists in the original charter-party in this case. I mean the clause providing that the Captain is to have a lien on the cargo for *all freight, dead freight and demurrage*.

But, with reference to the instrument which they had to construe, they held that there was no contract between the parties which would give the ship-owner a right of lien, because, as was mentioned in the judgment in *Howe* v. *Kirchner*, the freight was to be paid one month after the sailing of the ship, irrespective of the safe delivery of the goods, and was to be paid by the shipper, not by the consignees of the goods. Their Lordships were perfectly satisfied that in that instrument the word *freight* was not used in the sense that would give a right of lien.

In *Gilkison* v. *Middleton*, the lien was upheld as against indorsees of the bills of lading, to the extent only of the sums specified therein; and in that respect, according to *Kirchner* v. *Venus*, the decision was wrong, because by the bills of lading the freight was payable in Liverpool one month after sailing; vessel lost or not lost. But the Court also expressed an opinion that but for the terms of the bills of lading, the owner under the charter-party would have had a lien upon the outward cargo for a sum of £900, part of the gross freight agreed to be advanced before the vessel sailed, by charterer's acceptance, at three months, the acceptances having been dishonoured before the delivery of the cargo. The lien thus upheld is certainly subject to the inconveniences pointed out in the judgment in *Kirchner* v. *Venus*, where it is said.—"The inconveniences of establishing such a lien are very serious. If the ship-owner has a lien on the goods unless the money agreed to be paid at the port of shipment has actually been paid, what on arriving at the port of discharge is the Master to do? In many cases, probably in most cases, he can have no means of knowing whether the payment has or has not been made; the fact itself may be a matter of uncertainty, depending on the state of disputed accounts between the ship-owner and the merchant; or the money, though not paid at the

1864. April 20. day, may have been subsequently paid, or securities may have been taken or other arrangements made for giving time. Is the master to withhold the goods from the consignee, till by communication with the port of shipment all these matters have been cleared up? This communication may occupy weeks or even months, and the profit or loss on the adventure, and even the well-being or ruin of the consignee, may depend upon the state of the markets on the delivery of the goods a day or two sooner or later." Still, whatever the amount of inconvenience, there is nothing to prevent parties from entering into a contract giving a lien of that nature; and the only question in each case is whether they have so contracted.

In *Small* v. *Moates*, 9 Bing. 574, the express contract was for a full and complete lien upon the lading of the ship, as well for all losses which the owner might sustain in consequence of the non-payment of any bills to be given for freight, as for all arrears of freight, &c., but in this case the stipulation is simply, " the Captain to have a lien on the cargo for all freight, dead freight and demurrage."

Now that clause of the charter-party has been much commented upon in *Foster* v. *Colby*, 28 L. J. Exch. 81, and both Baron Bramwell and Baron Watson (than whom few men have had more experience in the construction of mercantile contracts) express a very strong opinion (with the concurrence rather than the dissent of Pollock, C. B. and Channell, B.) that the object of that clause is not to enlarge the right to a lien for freight, but to give the right to lien for dead freight and demurrage. " It is not intended by that (says Mr. Baron Bramwell), to give him a lien for freight which he would not otherwise have." " It means (says Watson B.) wherever there is a right to claim a lien for freight, in addition to that they have a right to claim a lien for dead freight and demurrage."

It is true that in this very case of *Foster* v. *Colby*, the case of *Gilkison* v. *Middleton* is referred to by the Judges with approbation, and as an authority on the point that a *bonâ fide* endorsee for value of a bill of lading, *without notice*(a) of any agreement to pay freight, other than that expressed in the bill of lading, is entitled to the goods on payment of the bill of lading freight, but only on that point—the attention of the Court of Exchequer not being called to the effect given in that case to the clause in the charter-party providing for a lien for all freight, dead freight and demurrage.

This being the state of the authorities on this subject, it seems to me that the case of *Gilkison* v. *Middleton* is so far impeached, as not to be conclusive upon the construction of the charter-party in question—and that I shall be acting more in accordance with the weight of authority, as well as with general commercial convenience, in holding that under the original charter-party, the owner of the "Gotheburg" had no lien on the outward cargo, in the event of the non-payment before delivery of the charterers' acceptances for advance of freight, than by following the decision in *Gilkison* v. *Middleton*. It is a charter-party for one entire voyage out and home. No freight, properly so called, can be earned under it, until the completion of the homeward voyage, and then the amount is to be calculated at certain rates, according to the port of discharge and according to the lengths of timber of which the cargo should consist. Upon that cargo the ship-owner would have a lien for whatever should be due on account of freight, but there is no stipulation for any payment on the delivery of the outward cargo at Madras. There is a stipulation that the charterers should advance £2,000 by acceptances at three and six months at the port of shipment, and that that sum if paid should be deducted from the amount of freight to be paid on the completion of the entire voyage; but an advance on account of freight to be afterwards earned, is not freight, and I cannot discover any evidence in the contract of an intention to make the delivery at Madras in any way contingent upon the payment of that advance.

Independently of any special contract, the ship-owner would have had a lien on the goods carried to Madras for the freight earned by that carriage; but the express contract excludes the common-law lien, which arises out of an implied contract: and the express contract here is to

(a) See *Kern* v. *Deslandes* 30 L. J. C. B. 297.

carry this cargo to Madras in consideration of freight to be paid at the termination of the homeward voyage. I have hitherto considered this question as if it arose between the ship-owners and the charterer, and as if the cargo in question had been shipped by and consigned to the charterer or his agents, since it is clear that the ship-owner can have no greater rights than those for which he has stipulated in the original charter-party (*Mickenson* v. *Begbie*, 6 Bing. 190). But, in fact, the cargo does not belong to the original charterer, but to the defendants who are the consignees, and as to a principal part of it, the shippers also, under another charter-party which they have entered into with the charterer, without notice of the first.

By the terms of that charter-party, construed in accordance with *Kirchner* v. *Venus*, there certainly would be no lien on the cargo shipped under it, for the freight (less £200) is made payable in advance ten days after sailing, and the £200 is made payable also in England after the delivery of the cargo. *Small* v. *Moates* 9 Bing. 579: *Soedergreen* v. *Flight*, cited 6 East 622, *Gledstanes* v. *Allen* 12 C. B. 202 are cases where the lien having attached upon the goods at the time of shipment, the parties against whom it was enforced, were regarded as being in no better position than the original charterers, by whom the goods were shipped and not entitled to the rights of an endorsee for value of a bill of lading given to a shipper who has loaded his goods on board the ship as a general ship, and without notice of any agreement between the charterer and the owner.

These defendants are in the condition of shippers who have put their goods on board without notice of any agreement between the original charterer and the owner; because the words "as per charter-party," in the bills of lading, cannot, I think under the circumstances stated in this case be understood as against them to refer to the original charter-party. In that original charter-party, there is no stipulation to prevent Messrs. Begbie and Co. from re-chartering the ship—and by our law it was unquestionably competent to them to do so upon any terms which they could obtain. Nor do I see in the circumstances stated, anything to throw upon the defendants the duty of making inquiry as to the real ownership of the vessel—or upon Messrs. Begbie the duty of communicating to them the existence of the original charter-party, assuming Messrs. Begbie to have understood that charter-party (as I have construed it) and as not giving to the owner any lien on the outward cargo.

But even supposing that the charter-party ought to be construed as giving or reserving to the ship-owner any lien for freight due on the outward cargo—my view is that, having reference to the principles established in *Paul* v. *Birch*, 2 Atk. 621, *Faith* v. *East India Company*, 4 B. Ald. 630, and subsequent cases, and the special circumstances of this case, the lien upon the goods of the Madras Railway Company, would extend only to the amount actually due in respect of the carriage of those goods, according to the contract upon which they had been shipped. In *Faith* v. *East India Company*, Bayley J. says, "By the very terms of the charter-party the lien is given. Its extent, however, as to the goods belonging to third persons, is by the case of *Paul* v. *Birch* regulated and confined to the amount of the freight which the goods when taken on board were liable to pay, that is, liable to pay according to the contract between the owners and the charterer." Abbott, C. J., says, "the owner of the ship was entitled to a lien upon the goods put on board by the different shippers abroad, to the extent of the freight due upon each of those consignments." In *Paul* v. *Birch*, L. C. Hardwick says, "The next consideration is, whether the bankrupts themselves (*i. e.*, the charterers) by virtue of *the charter-party* can bind the goods of the merchants to answer the freight? I think not" and again, "The bankrupts made an agreement with the master on their own account, and not on the part of the merchants, and therefore the merchants are not liable. Otherwise they would be in the hardest case imaginable, for they would be liable to any private agreement between the occupiers of a ship and the original owners of it."

It cannot, I think, be said that these observations are applicable only in case the ship-owner has by the charter-party wholly given up the control and possession of the ship to the charterer:—no such qualification

1864. April 20. is expressed—and they are not so understood in *Faith* v. *East India Company*.

Where, therefore, the goods of third parties, not connected with the charterer, are shipped and received under bills of lading on the terms of paying freight (simpliciter) no freight being specified, I understand the principle to be that the freight in respect of which the lien of the owner attaches, is the freight payable according to the real contract entered into by the shipper.

Therefore, upon the whole, having given the best consideration I could to the case in the time which I have had, I have come to the conclusion that I ought to answer the principal question in the negative.

Appellate Jurisdiction (a)

Referred Case No. 80 *of* 1864.

KADARSA RAUTAN *against* RAVIAH BI'BI'.

An instrument of hypothecation is a mortgage-instrument and may as such be registered under Reg. XVII of 1802, sec. 3 ; and a suit for the recovery of the money lent must be brought within three years pursuant to Act XIV of 1859 sec. 1 cl. 10.

1864. April 25. R. C. No. 80 of 1864.

CASE referred for the opinion of the High Court by T. Rangasvámi Pillai, the Principal Sadr Amín of Tanjore. The plaintiff in Small Cause Suit No. 73 of 1864 sued for rupees 58-15-10, the principal and interest due on an instrument of hypothecation dated the 29th June 1858. The questions submitted for the decision of the High Court were, first, " whether a deed of hypothecation is one falling under the head of mortgage capable of being registered under clause 3 section III Regulation XVII of 1802," and, secondly,

" Whether the period of limitation in the present suit, brought for the recovery of money lent without demanding specific enforcement of the claim on the real property assigned as security, is three years under clause 10, or six years under clause 16 section I Act XIV of 1859."

By Regulation XVII of 1802 (' A regulation for establishing a registry for wills and deeds, for the transfer or mortgage of real property') sec. 3, clause 3, the register is authorized and required to register memorials of " deeds of mortgage on lands, houses and other real property; as well as certificates of discharge of such incumbrances." By Act XIV of 1859, (' An Act to provide for the limitation of suits') sec. 1, cl. 10, the period of limitation " to suits brought to re-

(a) Present Scotland C. J. and Frere J.

cover money lent on interest, or for the breach of any contract in cases in which there is a written engagement or contract, and in which such engagement or contract could have been registered by virtue of any law or regulation in force at the time and place of the execution thereof" is " the period of three years from the time when the debt became due or when the breach of contract in respect of which the action is brought first took place, unless such engagement or contract shall have been registered within six months from the date thereof."

1864. *April 25.* *R. C. No.* 80 *of* 1864.

By the same Act sec. 1, cl. 16, the period of limitation applicable " to all suits for which no other limitation is hereby expressly provided" is " the period of six years from the time the cause of action arose."

No counsel were instructed.

The Court delivered the following

JUDGMENT :—This is a case in which there is a written instrument, promising to pay the money lent with interest and mortgaging certain lands as a security for the amount. Though possession was allowed to remain with the mortgagor, it was not the less a mortgage instrument (*a*), and consequently might have been registered under section 3 Regulation XVII of 1802. We are therefore of opinion that the period of limitation applicable to the suit was three years, in conformity with clause 10 section I Act No. XIV of 1859.

Appellate Jurisdiction (*b*)

Special Appeal No. 74 *of* 1864.

MAYAVANJARI CHUMAREN....................*Appellant.*
NIMINI MAYURAN..............................*Respondent.*

A kánamdár's right to hold for twelve years depends on his acting conformably to usage and the janmí's interest, and is lost if he repudiates the janmí's title. It makes no difference when this is first done in his answer.

THIS was a special appeal against the decree of H. D. Cook, Civil Judge of Calicut, in Appeal Suit No. 47 of 1863, affirming the decree of Husain 'Alí, District Munsif of Vellaiangód, in Original Suit No. 388 of 1861. The plaintiff

1864. *May* 12. *S. A. No.* 74 *of* 1864.

(*a*) See supra, p. 53.
(*b*) Present Frere and Holloway, J J.

1864. May 12. S. A. No. 74 of 1864.

sued to redeem certain lands which in the year 1027 (A. D. 1852) he had demised on káṇam to the first defendant. The purappád had only been paid up to 1035 (A. D. 1860). The first defendant by his answer in the suit denied that he had obtained the land on káṇam from the plaintiff, and on appeal contended for the first time that a káṇam was irredeemable within twelve years from the date of its creation. The Munsif, and on appeal, the Civil Judge decreed for the plaintiff. The first defendant now specially appealed.

Mayne, for the appellant, contended that no suit could be brought to redeem a káṇam within twelve years, on the mere ground of the rent being in arrear.

PER CURIAM :—That, no doubt, is so(*a*)—But here your client denies that he obtained the land from the person found to have been the janmí. The right of a káṇamdár to hold for twelve years certain is dependent on his acting conformably to usage and the interest of the janmí, and is lost if he repudiates the janmí's title and questions the validity of the káṇam(*b*). It can make no difference that this is done for the first time by the káṇamdár in his answer in the suit or that on appeal he takes the point as to non-redemption within twelve years.

Appeal dismissed.

Appellate Jurisdiction (*c*)

Special Appeal No. 40 *of* 1864.

NAMBIATAN NAMBU'DIRI.........................*Appellant.*
NAMBIATAN NAMBU'DIRI.........................*Respondent.*

The right of the eldest member of a Nambúdiri family to manage the illom is absolute and where a junior member has in fact managed it, then this is presumed to have been with the permission of the former, who may at any time take up the actual control.

1864. May 12. S. A. No. 40 of 1864.

THIS was a special appeal against the decree of H. D. Cook, Civil Judge of Calicut, in Appeal Suit No. 218 of 1863, reversing the decree of the District Munsif of Katnád in Original Suit No. 162 of 1861. The plaintiff, a

(*a*) See *S. A. No.* 157 *of* 1862, 1 Mad. H. C. Rep. 112.
(*b*) See *S. A. No.* 156 *of* 1863, 1 Mad. H. C. Rep. 445.
(*c*) Present Frere and Holloway, J J.

member of a Nambúdiri family, sued to redeem land demised by his father on káṇam to the first defendant. The first defendant pleaded that the plaintiff's káraṇavan, the second defendant, and not the plaintiff, was the proper person to sue. It appeared that the plaintiff was the nephew of the second defendant, who was the brother of the plaintiff's father, the late káraṇavan who died in the year 1029 (A. D. 1854).

1864. May 12. S. A. No. 40 of 1864.

The plaintiff alleged that from that time up to the present he conducted all the affairs of the illom, and that although the second defendant was the káraṇavan, he had never entered upon the duties of that office, but had led a wandering life, in fact had abdicated his duties altogether, and although káraṇavan he had nothing to do with the affairs of the illom.

The second defendant admitted that he demised the management of part of the illom property to plaintiff in 1034, (A. D. 1859); but he contended that he never gave up his authority and that so long as he, the káraṇavan, was alive, the plaintiff had no right to assume independent management.

The Munsif gave judgment in the plaintiff's favour, because it appeared that since the death of his father in 1029 (A. D. 1854), the plaintiff had managed all the affairs.

The Civil Judge in his decree, after stating the above facts proceeded thus :—

" The effect of the lower court's decree is in fact to set aside the káraṇavan altogether and to place the plaintiff, an anandiravan, in sole possession and authority.

" The Munsif admits the usage viz., that the káraṇavan is the recognized authority; but finding that the second defendant had never taken the management he now ignores his right to do so altogether.

" I am of opinion that the Munsif has erred in so doing. The second defendant is now the káraṇavan, and it is quite possible that he may have given the plaintiff permission to assume an extensive authority in the illom. But he may still reserve in his hands the rights of the káraṇavan, although the management may be deputed or permitted to remain in the hands of another. Admitting the plaintiff

1864. May 12. S. A. No. 40 of 1864.

to be in management, I still consider that it would be a very unwise precedent to set aside the authority of the káraṇavan on that account alone. So far as can be done it is the duty of the courts to uphold recognized usage and customs. How will usage and custom apply in the case under consideration?

"I take it that unless the káraṇavan has been proved utterly incompetent and been deprived of his rights by decree of court, the court has no authority to depose him, because an anandiravan may be the manager: he may be so by permission or delegation, but so long as there is neither a decree nor any family bond setting him aside, the authority of the káraṇavan must be upheld. The plaintiff in the present case, it is true, manages the greater part perhaps of the illom, but he has not shewn that the authority of the káraṇavan has been set aside by any legitimate procedure, and so long as he fails to do this, I deem it the duty of the court to uphold the recognized usage and keep the authority of the káraṇavan untouched.

"Such being my view of the case, I do not consider that the court was correct in recognizing the plaintiff's authority to sue, and to award restoration to plaintiff, thus in a manner by a small suit upsetting altogether the authority and right of the existing káraṇavan.

"I consequently must reverse the decree of the court below and dismiss the suit, assessing the plaintiff with all costs both in the original and appeal suits."

The plaintiff now appealed.

Mayne, for the appellant, submitted that the facts found in the original decree and not disputed by the Civil Judge, amounted to an abandonment by the second defendant of his káraṇavanship, to which he must be formally restored before he could exercise any rights as such.

Per Curiam:—The right of the eldest member of a Nambúdiri family to manage the property as káraṇavan is absolute, and where, as here, a junior member has in fact managed it, this is presumed to have been with the eldest member's permission, and he may at any time interfere and take the actual control. Here in the original suit the plaintiff admitted that the second de-

fendant became the senior member on the death of the plaintiff's father the mortgagor. This is equivalent to admitting that the second defendant is the proper person to redeem. The Munsif nevertheless decreed for the plaintiff. But on appeal by the second defendant the Civil Judge reversed the decree on the ground that the plaintiff had no right to sue. We think the Civil Judge was right, although the mortgagee did not appeal, and dismiss this appeal with costs. 1864. May 12. S. A. No. 40 of 1864.

Appeal dismissed.

Appellate Jurisdiction (a)

Special Appeal No. 159 *of* 1864.

VENKATASUBHA PATTAR................*Appellant.*
GIRI AMMA'L................................*Respondent.*

The plaintiff's voluntary absence abroad after attaining majority does not bar the operation of Act XIV of 1859.

THIS was a special appeal against the decree of J. W. Cherry, Civil Judge of Salem, in Appeal Suit No. 121 of 1863, affirming the decree of J. White, the District Munsif of Usúr, in Original Suit No. 55 of 1862. 1864. June 2. S. A. No. 159 of 1864.

The plaintiff as adoptive son of one Venkatakistnácharya who died in 1836, claimed a third of the Ulimangalam agraháram, of which the defendant had taken possession in the year Vilambi (1838). He alleged that his claim was not affected by the act of limitation, as from the year 1844, when he was fourteen years old, down to ten months previous to the filing of the plaint, he had lived in Nipál, Oude and the North Western Provinces. The District Munsif and, on appeal, the Civil Judge dismissed the suit as barred by the limitation Act.

Srínivasáchárya, for the special appellant, the plaintiff, referred to Act XIV of 1859, sec. 13*(b).*

The High Court held that the plaintiff's voluntary absence in a foreign country after he had attained his majority could not bar the operation of the Act, and dismissed the appeal with costs.

(a) Present Frere and Holloway, J J.

(b) "In computing any period of limitation prescribed by this Act, the time during which the *defendant* shall have been absent out of the British territories in India shall be excluded from such computation, unless service of a summons to appear and answer in the suit can during the absence of such defendant be made in any mode prescribed by law." See Macpherson *New Civil Procedure* 1860, p. 92, citing Sel. Rep. v. 5 p. 342: 1 Moo. P. C. C. 45, 46.

Appellate Jurisdiction (a)

Regular Appeal No. 57 *of* 1863.

RAMA RAU...*Appellant.*
RA'JA' RAU and others. ....*Respondents.*

The equitable doctrine of laches and acquiescence does not apply to suits for which a period of limitation is provided by the limitation act.

1864. June 6. R. A. No. 57 of 1863.

THIS was a regular appeal from the decree of L. C. Innes, the Civil Judge of Rajahmundry, in Original Suit No. 4 of 1862.

The plaintiff sued to recover the two muṭhṭhás of Palivella and Veravaram in the District of Rajamundry, on the ground that they had been purchased by the first defendant from funds of the zamíndárí of Pittapúr, left by the plaintiff's grandfather, Níladiri Rau who died in 1828, and also certain other property come to the hands of the first defendant. The plaint alleged that on the death of Níladri Rau, his wife, the first defendant, was constituted guardian of the property and person of his son Súrya Rau, the father of the plaintiff; that the first defendant accordingly took possession of personal property to the value of rupees 120,000, from which she, in the years 1835 and 1841 respectively, purchased the two muṭhṭhás during the minority of Súrya Rau, the plaintiff's father, and that on Súrya Rau attaining his majority in 1841, the first defendant promised to give up the property but failed to make any arrangement for the purpose; that Súrya Rau died in 1850, at which time the plaintiff was a minor, and that on the latter coming of age in 1862, he demanded an account and the delivery up of the two muṭhṭhás, but had not succeeded in obtaining satisfaction from the first defendant.

The plaint further alleged that certain property, described as No. II in the particulars and consisting of çerí lands at Pittapúr, was allotted for the maintenance of the first defendant during her life, and that the second defendant had executed to the plaintiff a formal deed of division, in which he renounced all claim to the estate of his father Súrya Rau.

(a) Present Scotland, C. J. and Frere, J.

The relief prayed in effect was recovery of the said two muṭhṭhás and the other property that might be found to have come to the hands of the first defendant upon an account being taken, as also that the plaintiff might be protected from the alienation by the first defendant of the land allotted for maintenance, in favour of her son and daughter, the second and third defendants.

The plaintiff relied on a will by Níladiri Rau dated 25th February 1828 and marked I. Under this will property was left to the first defendant in trust for the plaintiff's father.

The defendants denied the fact of the first defendant having taken possession of the property of Níladiri Rau on his death in 1828 as alleged, as also the liability of the first defendant to account for any such property. They added that the two estates No. I had been purchased from the private funds of the first and third defendants; and the *çerí* lands No. II had been assigned absolutely to the first defendant by her late husband, Níladiri Rau during his life-time for charitable purposes.

The Civil Judge was of opinion that the plaintiff had failed to prove the promise said to have been made to Súrya Rau in 1841 by the first defendant, and consequently that the plaintiff was barred by the law of limitations and by the laches and acquiescence on the part of his father and guardian, from demanding an account and the recovery of the estates No. I. He was further of opinion, upon the merits of the case, that the evidence failed to prove that the first defendant had possessed herself of property left by her husband, and had appropriated a portion of it to the purchase of the estates No. I. With respect to the *çerí* lands No. II, the conclusion come to by the Civil Judge was, that the plaintiff had not shewn that the first defendant had merely a life interest, and was not therefore entitled to any relief against the alienation of those lands. The Civil Judge accordingly dismissed the suit as respects the entire property.

The plaintiff now appealed against the decree.

Norton, for the appellant, the plaintiff.

Ritchie, for the respondent, the defendants.

1864. June 6. R. A. No. 57 of 1863.

The judgment of the Court, from which the following is an extract, was delivered by

SCOTLAND, C. J. :—The first question argued before us was whether, independently of the alleged promise of the defendant in 1841, the suit was barred by lapse of time. Upon this question we intimated our clear opinion at the close of the argument, that the judgment of the Civil Court could not be maintained and thereupon the case so far was not further pressed on the part of the respondents. It is not therefore necessary to say more now upon the question, but we may point out as regards the Limitation Act, that the Civil Judge was in error in treating the claim in the suit as a claim against a stranger to the estate, who had by fraud obtained possession of a portion of such estate. It is fairly shewn by the plaint that the relief prayed is based upon the ground of the first defendant having been entrusted by Níladiri Rau with the care and control of his property for the benefit of the plaintiff's father, and of her having possessed herself of such property and afterwards appropriated it to her own use. Then turning to the evidence we find the document (I) relied upon by the plaintiff, and there can be no doubt that in respect of any property proved to have come to the hands of the first defendant under that document, she would upon every just and sound principle be held responsible as trustee to the plaintiff. Quite independently therefore, of the alleged promise in 1841 the first defendant could not rely upon the law of limitation as a bar to the suit.

For the same reasons we think it clear the Civil Judge was also wrong in deciding that the plaintiff was precluded from maintaining the suit by reason of laches and acquiescence on the part of his father and guardian, and here we may state, as our present opinion, that it will be found, when necessary to decide the point, that the equitable doctrine of laches and acquiescence is not applicable to suits in the Mofussil for which a period of limitation is provided by the Limitation Act, and that lapse of time, as a defence to such suits, can only be relied upon when under the Act it has become a bar.

1864. *June* 6. *R. A. No.* 57 *of* 1863.

NOTE.—See supra *Special Appeal No.* 433 *of* 1863 p. 36, and consider the following remarks of Mr. Lewin (*Trustees* 3d ed. p. 571). "The question remains whether laches can in general be relied upon as a bar to a mere dry equitable demand falling within the purview of some or one of the Statutes of Limitation; and if, as suggested, public convenience be the true ground for holding laches to be a bar, then it would seem that the legislature itself having prescribed a term of limitation which it deems sufficiently short, the Court ought not further to abridge that term." He cites *Rochdale Canal Co.* v. *King*, 2 Sim. N. S. 89 : *Penny* v. *Allan*, 7 DeG. M. & G. 426 ; *Mehrtens* v. *Andrews*, 3 Beav. 76 ; *Duke of Leeds* v. *Earl of Amherst*, 2 Phill. 117 ; *Clark* v. *Hart*, 6 H. L. C. 633 : *Beaudry* v. *Mayor &c. of Montreal* 11 Moore P. C. C. 399 : *Story* v. *Gape*, 2 Jur. N. S. 706.

Appellate Jurisdiction (a)

Regular Appeal No. 8 *of* 1864.

PEDDAMUTTU VI'RAMAṆI................*Appellant.*
APPU RAU and others....................*Respondents.*

A Hindú widow's right to succeed to her husband's ancestral undivided property is only as his immediate heir.

A widow can only inherit family property where there has been a partition among the co-parceners of whom her husband was one, or where the whole property has vested in her husband by the death of all the other co-parceners.

The widow of an undivided Hindú who leaves a co-parcener him surviving, has, like the widow of a divided Hindú who leaves male issue, merely a right to maintenance.

Where, therefore, a widow sued for a Páḷaiyappaṭṭu as heir to the surviving brother of her husband :—*Held* that the suit must be dismissed.

1864. *June* 27. *R. A. No.* 8 *of* 1864.

THIS was a regular appeal from the decree of J. W. Cherry, the Civil Judge of Salem, in Original Suit No. 1 of 1861. The plaintiff, senior widow of one Chóki Gauḍu eldest son of Kempi Gauḍu, sued to recover the Páḷaiyappaṭṭu (பாளையப்பட்டு) of Ankusagiri and other property in the possession of the first defendant. The defendants were 1, Appu Rau the son of a sister of Chóki Gauḍu ; 2, Chinnamaṇi the second widow of Chóki Gauḍu ; 3, Chinnamuttu Víramaṇi widow of the second son of Kempi Gauḍu ; 4, Akkachi Ammaṇi and 5, the Collector of Salem. The first, third and fourth defendants denied the plaintiff's right to succeed and set up distinct rights in themselves. These and the argument will be more easily understood from the following pedigree :

(a) Present Scotland, C. J. and Frere, J.

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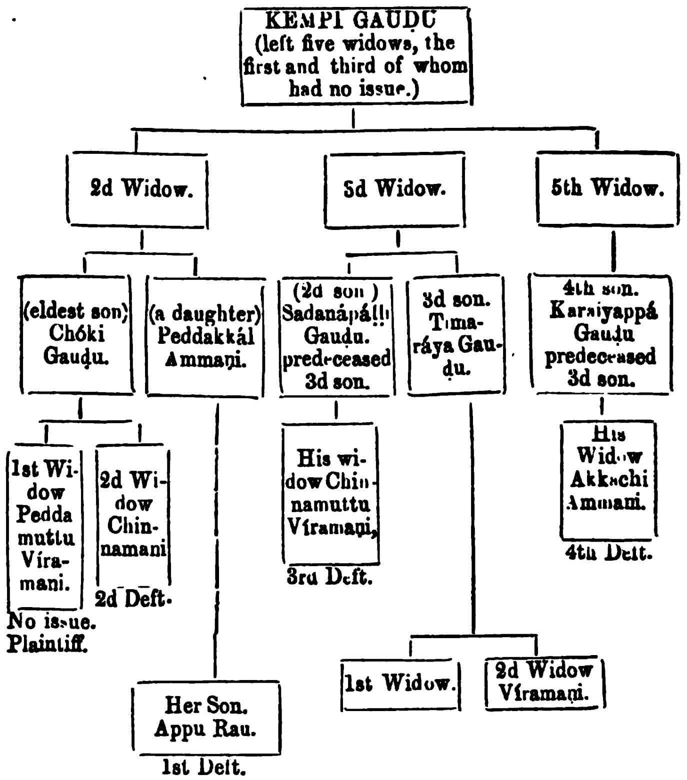

The first defendant, Appu Rau, pleaded the act of limitations, and stated that the Pá'aiyappaṭṭu had been granted by the former native government, which grant had been confirmed by the British Government, and submitted that under Reg. IV of 1831 and Act XXXI of 1836 the suit could not be entertained without the sanction of Government.

The second defendant, Chinnamaṇi, supported the plaintiff's case and submitted that under the Hindú law the property descended first to the plaintiff and then to herself as junior widow of Chóki Gauḍu.

The third defendant, Chinnamuttu Víramaṇi, claimed as the widow of Sadanápaḷḷi Gauḍu, the second son of Kempi Gauḍu, but does not appear to have put in any written statement and was declared *ex parte*.

The fourth defendant claimed as sole devisee under the will of Víramaṇi, the second wife of Timaráya Gauḍu, to whom the property had been granted by the Government.

The fifth defendant, the Collector of Salem, pleaded that the Pálaiyappaṭṭu in dispute had no sanad-i-milkíat-i-istimrár such as that contemplated by Regulation XXV of 1802 to constitute the same a hereditary property. He admitted however that the Pálaiyappaṭṭu in question was zufted by Mr. Knox at the time he was collector of Salem, but alleged that the latter did so purely in good faith for the protection of the property and prevention of injury thereto until the Government of Madras in the exercise of the right vested in them as the ruling power should determine to whom possession should be given. 1864. June 27. R. A. No. 8 of 1864.

The fifth defendant further urged that under the order of the Honourable the Governor of Madras of the 9th April 1861 he delivered the possession of the Pálaiyappaṭṭu to the first defendant Appu Rau, and that such order was passed in the exercise of the right vested in such Government as the ruling power, and that the passing of such order was an Act of State which could not be enquired into in this Court or in any municipal Court of Justice within her Majesty's dominions.

The Civil Judge settled seven issues, of which it was ultimately found necessary to consider only one, viz., whether the Pálaiyappaṭṭu was hereditary property over which the Court had jurisdiction.

The following is an extract from the Civil Judge's decree :

"The main point for the consideration of the court in this suit is, whether it has been established in evidence, that the Pálaiyappaṭṭu in question is one over which this court has jurisdiction, because it is a permanently assessed zamíndárí and consequently hereditary property.

"The Court is of opinion that the sanad put in by plaintiff marked A and dated 22nd December faṣlí 1209 or the year 1800 is not a sanad as described in section III Regulation XXV of 1802 upon which document the plaintiff's claim is based.

"The plaintiff has not produced a formal sanad-i-milkíat-i-istimrár, " nor is there any evidence of a corresponding ḳabúliyat" such as contemplated in the above enactment.

1864 June 27. R. A. No. 8 of 1864.

"Though the annual assessment may have been the same ever since the date of the original grant, though the ḳists may have been fixed and dates of payment determined, though attachments may have issued on failure of such payments, and though members of the same family may have been in possession in order of "successions", and every feature of this case may be similar to such as would be recognised in a permanently assessed zamíndárí, yet the Court is without the important evidence of the Government having formally declared this Páḷaiyappaṭṭu to come under the provisions of Regulation XXV of 1802.

"The Governor in Council as the ruling power in this Presidency has a proprietary right to lands like those of this Páḷaiyappaṭṭu and the court feels itself incompetent to investigate the right exercised by that authority on this occasion, of granting away to the first defendant the said Páḷaiyappaṭṭu.

"It was contended on the part of the plaintiff that in order to make this an Act of State this gift of the Governor in Council should have been ratified by the Secretary of State for India. The Court is of opinion that though such is wanting, yet to all intents and purposes the British Government as represented by the Governor in Council have all the right of disposing of this Páḷaiyappaṭṭu at their pleasure, and that in exercising that right without a question there is no necessity for such a gift to be formally ratified and confirmed by another authority out of this country.

Under this view of this case the Court consider it unnecessary to go into the question of whether the Páḷaiyappaṭṭu in dispute is governed by the rules of primogeniture or into the points raised in the other issues.

"The court therefore rejects the claim of the plaintiff to the Páḷaiyappaṭṭu of Ankusagiri."

Ritchie, for the appellant, the plaintiff. The plaintiff as senior widow of Choki Gauḍu was, in the absence of any issue of Timaráya, the nearest female member of the family and as such entitled to succeed. The first defendant is only a sister's son and therefore could not succeed. [He cited Strange's *Manual of Hindú Law*, § 353 ; Elberling *on In-*

heritance &c., 368; Branson's *Vakíl's Guide*, p. 60; and *Doe* d. *Kuḷḷammáḷ* v. *Kuppu Piḷḷai(a).*]

1864. *June* 27. *R. A. No.* 8 *of* 1864.

Mayne, for the first defendant. The Palaiyappaṭṭu is ancestral property. On the death of Chóki Gauḍu, the plantiff's husband, as the family was undivided, the property vested solely in his brother Timaráya, and on his death without issue passed to Timaráya's widows successively for life as his immediate heirs. When Víramaṇi, the junior widow, died, the person to succeed was the next heir in Timaráya's family. The plaintiff is not such heir. None of the authorities cited on the other side support the contrary contention. A brother's widow cannot stand in the line of heirs to her husband's brother or to the widow of her husband's brother. She can only come in as the *immediate* heir to her husband: *Mitákshará* chap. II. sec. i· cl. 39. Here the plaintiff had only a right to maintenance. She is not Timaráya's widow and cannot inherit to her husband as the property had passed away from him. The answers of the paṇḍits of the late Ṣadr Court to the questions put by the Board of Revenue are opposed to the right now set up*(b)*. A widow cannot inherit undivided family property, unless when it has become vested in her husband as the sole survivor of the co-parceners.

Dale, the Government Pleader, for the Crown, expressed his concurrence in *Mayne's* arguments.

Ritchie replied.

The Court delivered the following

JUDGMENT:—The plaintiff in this suit, claiming by right of succession as widow, seeks to recover the Páḷaiyappaṭṭu of Ankusagiri in the possession of the first defendant, and the paṭṭukaṭṭu lands therein, as also the moveable property belonging to the Páḷaiyappaṭṭu. The defendants, except the second defendant, deny the plaintiff's right to succeed, and all rely upon distinct rights in themselves; but it is not necessary to do more here than refer to the objections relied upon by the first and fifth defendants. Their written statements set up that the proprietary right in the Páḷaiyappaṭṭu had never passed from the ruling power of the country; that the family of the plaintiff's husband had held, not by

(a) 1 Mad. H. C. Rep. 85.

(b) See these questions and answers printed in the Note at the end of this report.

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hereditary right, but at the will of the Government as the ruling power, by whom, upon the death of the last possessor, the Pálaiyappaṭṭu was granted to the first defendant. The fifth defendant further submitted that the order of the Government, granting the Pálaiyappaṭṭu, was an act of State which the Court could not enquire into.

In the Civil Court issues were recorded as to all the questions arising between the parties; but only one of such issues was considered and decided. The Civil Judge held, as to the Pálaiyappaṭṭu, that as the plaintiff had failed to prove the formal istimrár sanad required by Regulation XXV of 1802, the proprietary right could not be considered as having passed from the Government as the ruling power, and that the Court was incompetent to investigate the right of the Government to make a grant of the Pálaiyappaṭṭu to the first defendant; and thereupon he decreed the dismissal of the suit, as regarded the claim to the Pálaiyappaṭṭu.

The plaintiff has appealed against the decree of the Civil Court on several grounds, but upon the hearing before us the arguments were confined to the question involved in the fifth ground, namely, whether, taking the case to be as presented by the plaintiff, she was entitled as heir to succeed to the Pálaiyappaṭṭu on the death of the person last in possession; and our opinion upon this question renders it unnecessary to enter upon the consideration of any other point in the case. For the purpose of our decision we must assume, and we do no more, that the Pálaiyappaṭṭu was, as the plaintiff alleges, the ancestral hereditary property of the family of her husband. As to the other facts upon which the question rests, the defendants raise no dispute.

The Pálaiyappaṭṭu, it appears, was in the possession and enjoyment of Karaiyappá Gauḍu when the country first came under British rule, and after his death it passed to his grandson, Kempi Gauḍu, who was succeeded in the possession by his eldest son Chóki Gauḍu, the husband of the plaintiff and of the second defendant. Kempi Gauḍu had five wives, three sons besides Chóki Gauḍu, and two daughters. The third and fourth defendants are the widows of his second and fourth sons, and the first defendant is the son of his daughter by his first wife. Upon the death of Chóki Gauḍu, the Pálaiyappaṭṭu passed to Timaráya Gauḍu, the

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third son of Kempi Gauḍu, by his third wife, his second son being dead; and his fourth son died before Timaráya Gauḍu. None of the sons had male issue, but Chóki Gauḍu and the second and fourth sons left daughters, who had married and removed from the family. Timaráya Gauḍu had two wives, who survived him; and upon his death, there being no male heir, the Pálaiyappaṭṭu passed to his senior widow, and at her death to his other widow, Víramaṇi. Upon the death of Víramaṇi the Pálaiyappaṭṭu was zufted by the Collector, and held by him until the first defendant was put in possession under an order of Government granting the property to him.

Upon these facts, and treating the Pálaiyappaṭṭu as ancestral property, there can be no doubt, the family being undivided, that Timaráya was the rightful heir entitled to succeed upon the death of his brother, the plaintiff's husband, and that the proprietary right became vested in him solely, and passed to his two widows successively for life as his immediate heirs. This being so, the person to succeed upon the death of Víramaṇi was the next heir in the family of Timaráya, and unless the plaintiff stands in that situation, she altogether fails in the suit. The contention of the vakíl for the appellant we understood to be, that the right of females in an undivided family to inherit in default of male members was not confined to those who were strictly in the line of heirs of the person last seized of the property, and that the plaintiff, as senior widow of Chóki Gauḍu, was, in the absence of any issue of Timaráya, the nearest female member of the family, and as such entitled to succeed, the first defendant, a sister's son, not being in the line of heirs.

We think the Hindú law of succession affords no ground for this contention. No authority of any kind supporting it has been referred to, and the Paṇḍits of the late Ṣadr Court have given opinions in the suit opposed to any legal right of the plaintiff as heir. The authoritative text of the Mitákshará, Cap. II, sec. 1, cl. 39, that a wife "takes the whole estate of a man, who, being separated from his co-heirs and not subsequently re-united with them, dies leaving no male issue," recognizes the widow's right to succeed only as the immediate heir of her husband, and is op-

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posed to any right in the widow to inherit undivided family property. By the recent judgment of the Privy Council in the case of *Katama Nauchear* v. *The Rajah of Shivagungah*, it has been decided, that this text does not apply to the self-acquired property of a co-parcener. But, as regards property held in co-parceny, there can, we think, be no doubt that the law which governs here is in accordance with the rule of succession there laid down. Unless there has been a partition between the co-parceners, or the entire family-property has by the death of all the co-parceners vested in one survivor who leaves a widow, the right to inherit as widow does not arise. If upon the death of the husband the family-property passes to a co-parcener by right of succession (as we take it the Pálaiyappaṭṭu passed in this case), the widow possesses no more than a right to maintenance, just as in the case where the husband dies, separated in estate from his family, and leaving male issue who inherit his property. We may refer here to the opinions recorded in 2 Strange's *Hindú Law*, 231-233, and to a case *No.* 12 *of* 1818 reported in 1 *Madras Ṣadr Decrees* 210. There is no principle of the Hindú law of succession that we are aware of, upon which the plaintiff can rest her claim to succeed by right of inheritance from Timaráya, in whom, as sole survivor, the entire proprietary right became vested. Tbe principle upon which the relationship of wife secures the right of inheritance, whether that principle be the widow's competency to perform her husband's funeral obsequies or, as put by Vṛihaspati that half the body of the husband survives in the widow (see the *Shivagungah Case* above referred to and *Vírasvámi Grámaṇi* v. *Ayyásvámi Grámaṇi*(a)), it is obvious, affords no foundation for the plaintiff's claim to succeed as heir to the surviving brother of her husband. There appears to us no legal ground for saying that, as widow, the plaintiff is in any better situation now to claim the right to inherit than she was at the death of Timaráya, or that more remains to her than the right to maintenance which she hitherto possessed.

For these reasons we are of opinion upon the case as made by the plaintiff herself, that she had no right, as heir, to succeed to the possession of the Pálaiyappaṭṭu, and must

(a) 1 Mad. H. C. Rep. 475.

consequently fail in the suit. Upon this ground, and without considering in any way the point decided by the lower Court, we uphold the decree dismissing the suit. The respondent's costs ofthe appeal must be borne by the appellant.

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Decree affirmed.

Note.—Here follow the opinions of the paṇḍits above referred to:

Question.

A was the proprietor of a Pálaiyappaṭṭu at the time the country was assumed by the British Government. At his death, the estate descended to his eldest son B, from whom it passed to his only son C, who married five wives D, E, F, V, W. By the first of these wives, C had one son, G; by the second wife, two sons J and L; by the third wife, one son, O; by the fourth, no issue; and by the fifth, two daughters who are still alive.

At the death of C, the estate was registered in the name of his eldest son, G. During the life time of G, his second brother J died, in consequence of which the estate descended at the death of G to his third brother L. During the life time of L, his youngest and sole surviving brother, O, died without male issue. Therefore on the death of L, the estate was registered in the name of his eldest widow M under the sanction of the Board [of Revenue;] and on her death, the estate passed under similar sanction, to N, the junior widow, on the understanding that she should support the other members of the family.

N has now died, and the four surviving widows H, I, K, Q have severally preferred a claim to have the estate registered in their name. There are also the other parties living indicated in the genealogical table. It is required to know *first*, whether any of the four surviving widows is entitled to more than maintenance from the property; and *secondly*, if that question be answered in the affirmative, what rights in the estate belong to each. Also what rights, if any, belong to the other members of the family.

19th Nov. 1863.

Answer of the Paṇḍits of the Sadr Court.

It appears from the question that L who succeeded to the Pálaiapaṭṭu, having demised, the estate was, in consequence of the total extinction of the male line of the family, registered, in the first instance, in the name of his senior widow M by reason of her seniority and, after her death, in the name of his junior widow N, although both of the widows were equally entitled to the said estate under the text declaratory of the widow's right of inheritance. Hence the right of succession to N, depends solely upon the propinquity of relationship to *her*.

As regards the females H, I, K and Q, who are the widows of the brothers of N.'s husband, they cannot inherit the estate of N, nor are they entitled to anything more than maintenance, inasmuch as the Hindú law authorises them neither to perform the funeral rites, nor to inherit property, and more especially as the lawbook "Smriti Chandriká" excludes from inheritance all females other than those who are expressly declared heiresses by law.

Among the other parties indicated in the genealogical table annexed to the question, there exist four sons of G.'s sister, the daughter of C. They being sons of the step-sister of the husband of N, offer funeral cake to N.'s husband, to N, to her father-in-law C, and to his father and grandfather. The law on "Woman's Property" declares that the estate of a childless widow shall go to her husband's sister's sons.

Under these circumstances, the aforesaid sister's sons (of N.'s husband) are entitled to succeed to the estate of N, subject to the obligation of maintaining H and others.

Authority.

Vaidyanátha-Díkshitiyam on Çráddha Rites.

"Let a man having made funeral offerings to his father and two "others present similar offerings to his maternal grand-father, &c., in "order to redeem himself from debt."

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"Where a man offers funeral oblations to his father, &c., he must "invariably offer them also to his maternal grand-father, &c., else, he would "fall into the infernal regions."

Gopála-Bháshyam on Performance of the funeral Rites of deceased Woman.

After enumerating the several persons down to daughter-in-law, who are entitled to perform the funeral ceremonies, the author says, "On "their failure, the funeral of a deceased woman shall be performed by "her husband's sister's son, and on his failure, by the son of her own "sister, or brother, or by her son-in-law."

A text* says, "The mother's sister, the maternal uncle's wife and the like."

*This text is cited in extenso below.

Law of Inheritance on "Woman's Property"

"The mother's sister, the wives of maternal and paternal uncles, the "father's sister, the mother-in-law and the wife of an elder brother, are "pronounced similar to mothers. If they leave no son of their bodies, "nor daughter's son, nor son of those persons, the sister's son and the "rest shall take their property."

(Signed) APPANAÇA'STRI',

5th December 1860. Senior Paṇḍit, Ṣadr Court.

It appears that the Pálaiyappaṭṭu referred to in the question, is indivisible, and descendible to the elder line in the family. It is for these reasons that the estate seems to have been registered in the name of the senior widow of L (the last male incumbent, who died without male issue) and after her death, in the name of his junior widow, on the understanding that they should support the widows of the persons who had previously held and enjoyed the estate.

None of the present claimants, viz., the four surviving widows of the brothers of N.'s husband, are entitled to succeed to the property in question, under the provisions of the Hindú law prevalent in Southern India. They are all, however, equally entitled to maintenance from the property, but as Q, the surviving widow of the brother of the husband of N, who died last, never enjoyed the estate in question, the proper course is, to put her in possession of the estate for life, on condition of her maintaining the other parties, and after her death, to annex the estate to the State.

The step-nephews of N.'s husband, referred to in the question, have no right whatever in the estate under the Hindú law.

(Signed) C. GOPA'LAÇA'STRI',

8th December 1860. Junior Paṇḍit, Ṣadr Court.

From the Senior Paṇḍit of the Ṣadr Court.

In Smṛtichandriká, Sarasvatívilása, Mayúkha, Mádhaveyam, Víramitrodáya, and other famous Hindú lawbooks recognised by Courts in this part of India, and also in Jímútaváhanam and other works prevalent in the territories subject to the Presidency of Bengal, "Cha. on succession to woman's property," the text* of Bṛhaspati is cited, which refers to "the mother's sister, the maternal uncle's wife, and the like." This text, which is acknowledged by all, distinctly mentions "husband's sister's son," and unequivocally declares them entitled to inherit the property of "the widows of their maternal uncles." It is upon this text that my former answer was based. But the Head Translator has informed me that the Judges wished that I should declare the law according to Mitákshará. I therefore beg hereunder to recite passages from the said work.

*This text is quoted in extenso in the former answer.

In Mitákshará "On succession to the property of a childless wife," is cited the text of Yájñavalkya, which says, "The "property of a childless woman, married in the form "denominated 'Bráhma,' or in any of the four (unblamed modes of mar- "riage,) goes to her husband, but if she leave progeny, it will go to her "(daughter's) daughters: and, in other forms of marriage (as the A'sura, "&c.,) it goes to her father (and mother, on failure of her own issue.")

Cha. II, Sec. XI, page 367, Clause 10.

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The commentary on the above runs thus:—"Of a woman dying "without issue as before stated, and who had be- "come a wife by any of the four modes of marriage "denominated Bráhma, Daiva, A'rsha and Prájápatya, the (whole) pro- "perty, as before described, belongs in the first place to her husband. "On failure of him, it goes to his nearest kinsmen (Sapiṇḍas) allied by "funeral oblations." Hence, the property of a childless woman goes, on failure of her husband, to his "nearest Sapiṇḍas;" that is, the "nearest Sapiṇḍas," take where a multitude of Sapiṇḍas exists.

Page 368, Clause 11.

All those kinsmen who offer "piṇḍas," or funeral oblations to the same ancestor, stand in the relation of "Sapiṇḍas" to each other. Of these persons, those sprung from the same (Gotra) family with the deceased, are called "Sagotra Sapiṇḍas" or kinsmen sprung from the same family, and connected by funeral oblations, as brethren, paternal uncle, &c.; while the others sprung from a different (Gotra) family are denominated "Asagotra Sapiṇḍas," or kinsmen sprung from a different family, but connected by funeral oblations, as the sister's sons, the sons of the mother's and father's sisters and the like. The connection, by the funeral oblations, of kinsmen sprung from a different family, is recognised also by the Mitákshará, as will appear from a passage which occurs in the treatise "On succession of kindred of the same "family name," and which runs thus:—"for kins- "men, sprung from a different family, but connected by funeral oblations, are indicated by the term cognate (Bandhu.")

Cha. II. Sec. V, Page 360, Clause 3.

The father, grand father, and great-grand-father of L (the husband of N.) to whom L offers funeral oblations, being the maternal grand-father and maternal great-grand-father, and maternal great great-grand father of the sons of L.'s sister, the latter (that is, L.'s sister's sons) of course offer funeral oblations to them in performing the Çráddha rites on new moon, &c., and as L and his sister's sons thus present funeral oblations to the same ancestors, they stand in relation of "Sapiṇḍas" to each other; and, as such, they are entitled to inherit the property of L.'s widow N, more especially as the question does not show the existence of any other Sapiṇḍa kinsmen. Hence, it would appear that Mitákshará also acquiesces in the interpretation of the text of Bṛhaspati, which vests the right of succession to a woman's property in the sons of her husband's sister.

L having been the holder of Pálaiyam, must of course have been a man of wealth, rank and dignity and, as such, he might have married N, in the most approved form of "Brahma." It is upon this consideration that I have dealt with the subject according to the above passages of Mitákshará.

If, on the contrary, L had married N, in the form of A'sura, which, as a sordid act, is disapproved, the case must be dealt with according to the last part of Yájnavalkya's text, and its commentary, contained in Mitákshará, which runs thus:—"But in the other forms of marriage called A'sura, "Gándharva, Rákshasa and Paiçácha, the property of a childless woman "goes to her parents."

Mitákshará Chapter II, Section XI, Page 368, Clause 11.

(Signed) APPANAÇA'STRI',
Senior Paṇḍit, Sadr Court.

21st December 1863.

Being required to support my answer by authorities according to Mitákshará, I beg to submit that there exists no law under which the surviving widows of the brothers of N's husband can succeed; but the reason why I suggested that Q, one of the said widows, might be put in possession, is because the estate in question having, at the death of G, devolved upon her (Q.'s) husband O, equally as upon L, according to the Hindu law (although L alone held it by reason of his seniority), I considered it but fair that Q, the widow of O, should also be allowed to enjoy the estate for life, after the demise of the last incumbent N, the widow of L.

(Signed) C. GOPA'LA'ÇASTRI'.
Junior Paṇḍit, Sadr Court.

4th January 1861.

Appellate Jurisdiction (a)

Regular Appeal No. 42 *of* 1863.

CHINTALAPATI CHINNA SIMHADRIRA'J.........*Appellant.*
THE ZAMI'NDA'R OF VIZIANAGRAM and others...*Respondents.*

A zamíndár's estate is analogous to an estate tail as it originally stood upon the statute *De Donis.*

The zamíndár is the owner of the zamíndárí, but can neither incumber nor alienate beyond the period of his own life.

Marriage is a valuable and not merely a good consideration.

1864. *July* 9. *R. A. No.* 42 *of* 1863.

THIS was a regular appeal from the decree of Charles Reade, the Agent to the Governor of Fort St. George at Vizagapatam, in Original Suit No. 199 of 1857.

In this suit the plaintiff, the grantee of a former zamíndár under the permanent settlement, sought to recover a village granted by that zamíndár. It was alleged that the grant was made on account of jewels, and that it had been resumed at the accession of the present zamíndár.

The present zamíndár answered that the resumption was perfectly legal, and that he had granted the village to members of the family of the original donee.

The Agent considered the right to resume clear, and dismissed the suit with costs.

Sloan, for the appellant, the plaintiff, admitted that there were several cases negativing the right of the zamíndár to alienate for a period beyond his own life, but submitted that they were distinguishable as being merely for a *good,* and not, as here, for a *valuable* consideration. *S. A. No.* 5 *of* 1862*(b)*, *Appeal Suit No.* 6 *of* 1821*(c)*, *S. A. No.* 29 *of* 1848*(d)*, *R. A. No.* 15 *of* 1860*(e)*, *S. A. No.* 210 *of* 1861*(f)*.

HOLLOWAY, J :—When the law has made rules as to the disposition of property they are not to be set aside by any so-called 'equity and good conscience.' The question is whether or not this zamíndár took the steps which

(a) Present Phillips and Holloway, J J.

(b) M. S. J. 1862, p. 148.

(c) Mad. Sel. Dec. 284.

(d) Mad. S. D. 1849, p. 51.

(e) Ibid. p. 162.

(f) M. S. D. 1862, p. 19.

Reg. XXV of 1802 renders necessary to effectuate an alienation of his zamíndárí. 1864. July 9. R. A. No. 42 of 1863.

Norton (with him *Rangácháriyár*) for the respondent, the first defendant, and

Rájágópálácháriyár, for the respondents, the second, third, fourth and ninth defendants, were not called upon.

PER CURIAM :—The vakíl for the appellant quoted numerous cases, all disallowing the right of any zamíndár under the permanent settlement to alienate for any period beyond his own life; but sought to distinguish them on the ground that this was a grant for a valuable consideration. Independently of the fact that several grants set aside by these cases, were on account of marriage, which is a valuable and not merely a good consideration, the ratio decidendi of all the cases down to the two latest (in 1 Mad. H. C. pp. 148 and 455), clearly is, that the zamíndár has really an estate analogous to an estate tail, as it originally stood upon the statute *De Donis*. He is the owner, but can neither encumber nor alienate beyond the period of his own life. If he had sold, the sale would be inoperative beyond his life, and would amount merely to an alienation of his life-interest. It is quite clear that there is no ground for this appeal, which must be dismissed with costs.

Appeal dismissed.

Appellate Jurisdiction (a)

Special Appeal No. 219 *of* 1864.

SUBBA'ḶUVAMMA'Ḷ and another......*Appellants.*

AMMA'KUṬṬI AMMA'Ḷ and others......*Respondents.*

According to Hindú law an orphan cannot be adopted.

THIS was a special appeal against the decree of Kristṇasvámi Ayyar, Acting Principal Ṣadr Amín of Tanjore, reversing the decree of Sankara Ayyar, District Munsif of Pappávinásam, in *Original Suit No.* 1421 *of* 1861; and the chief point was whether the adoption of one Naráyaṇ- 1864. July 9. S. A. No. 219 of 1864.

(a) Present Phillips and Holloway, J J.

1864. July 9. S. A. No. 219 of 1864.

appaiyan was valid, both his natural parents being stated to have been dead at the time of the alleged adoption. The Ṣadr Amín held that even if this were so, the adoption would have been valid on the principle *factum valet quod fieri non debuit.*

Rájágópáláchárlu, for the appellants, the plaintiffs.

Rangácháriyár, for the respondents, urged that even if the adoption were invalid, the plaintiffs could not be heard to say so, as they had acquiesced in it since 1849.

PER CURIAM :—In *Veerapermal Pillay* v. *Narrain Pillay(a)* it was held that though both parents were dead a child might be given in adoption by his elder brother. But this position is ably contested by Sir F. W. MacNaghten in his *Considerations on Hindú Law*; and his citations (p. 210) from Kullúkabhaṭṭa, Vachespati Miçra and the Áditya Puráṇa certainly seem to shew that, according to Hindú law, an orphan cannot be adopted. To constitute a valid adoption there must be a giving as well as a receiving. Here there seems to have been no one to give the child. No amount of ratification can supply the absolute essentials of a transaction like the present. There must be an issue directed as to whether or not both parents of the child were alive at the time of the alleged adoption.

Issue accordingly.

(a) 1 Strange's Notes of Cases, 91.

Appellate Jurisdiction (a)

Regular Appeal No. 38 *of* 1864.

UḌAIYA TE'VAR..............................*Appellant.*
KATAMA NA'CHIYA'R and another.......*Respondents.*

To give effect to the plea of res judicata the Court must be satisfied that the ground of legal right on which the plaintiff sues, was a point raised and opened for decision in the former suit and that it was finally dealt with by the judgment and decree therein.

T claimed a zamíndárí as the representative of a devisee under a will. In 1845 A, one of the zamíndár's widows, had sued T's father for the zamíndárí and he, in his answer, had set up the will. In 1856 K, the zamíndár's second daughter and A's successor according to Hindú law, had sued T's guardian for the zamíndárí, and he, in his rejoinder, also relied on the will. Both suits were decided against the plaintiffs, but in one the parties were restricted to evidence on a point which was raised as to division and in the other no points nor issues were settled. On an appeal by K to the Privy Council against the decrees of 1845 and 1856 the will was not relied on, because as such it was considered and admitted to be untenable and the Privy Council decided against T, reversing the former decrees. T now sued K for the zamíndárí grounding his claim on the will. The Civil Judge rejected his plaint under Act VIII of 1859 sec. 2:—*Held,* on regular appeal, that although the Privy Council had given no direct decision upon the will, their judgment and final order involved the decision of all claim of title under that will, and must be considered, as between the parties, tantamount to an express adjudication upon such claim.

A party is bound to bring forward his whole case in respect of the matter in litigation and open to him upon the points for decision in the suit. He cannot abstain from relying upon, nor abandon a ground of claim which is in question and proper for consideration and decision in the suit and afterwards make it a cause of fresh suit in respect of the same subject-matter.

Henderson v. *Henderson* and *Hunter* v. *Stewart* followed.

Seddon v. *Tutop* observed upon.

THIS was a regular appeal by Strímatu Rájá Muttuvijaiya Ragunáda Bóddagurusvámi Periya Uḍaiya Tévar against an order of C. R. Pelly, Acting Civil Judge of Madura, dated 4th May 1864 rejecting under section 2 of the Code of Civil Procedure the plaint of the appellant who sued for possession of the zamíndárí of Sivagengé. The plaintiff claimed the zamíndárí as the grandson and legal personal representative of Muttu Vaḍuga Tévar, devisee under the alleged will of Gauri Vallaba Tévar which was dated 17th June 1829 and in the following terms: "I am

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R. A. No. 38 *of* 1864.

(a) Present Scotland, C. J. and Holloway, J.

1864. July 11. R. A. No. 88 of 1864.

labouring under rheumatism. If my chief wife or Paṭṭa-pastrí Parvatávardani Náchiyár, who is now pregnant, happens to bring forth a son he should succeed me as the zamíndár, and until [leg. so long as] his minority lasts he should be under the tutelage of my nephew Muttu Vaḍuga Tévar of Padamatúr. In the event of her not being delivered of a son, the said Muttu Vaḍuga Tévar should himself succeed to the estate as the sole proprietor. The legatee should not only treat the sons of my daughters with all respect and protect them, but even maintain my family and the confidential servants attached to the state. Thus do I voluntarily make out this will: this is drawn out by Rayasam Subramániyar." The plaint, from which the other facts of the case will appear, was in the following terms:—

Memorandum of Plaint.

Strímatu Rájá Muttuvijaiya Ragunáda Bóddagurusvámi Periya Uḍaiya Tévar, Zamíndár residing at Sivagengé. } *Plaintiff.*

versus

I. Katama Náchiyár *alias* Kulundapuri Náchiyár, Zamíndár of Sivagengé.
II. Armuga Tévar, husband and legal representative of Bóddaga Náchiyár, deceased, residing at Madakotta Ta'aluk. } *Defendants.*

1. The plaintiff seeks possession, from the first defendant, of the Sivagengé zamíndárí together with villages purchased, and Punnani lands with Devasthánams and satrams: the annual value of which is rupees 620,000-0-0, to which the plaintiff is entitled as grandson and legal representative of Muttu Vaḍuga Tévar, to whom the same was bequeathed by Gauri Vallaba Tévar by a will dated the 17th day of June 1829. The zamíndárí continued in the possession of the said Muttu Vaḍuga Tévar, and of his sons Bóddagurusvámi Tévar and Gauri Vallaba Tévar, and of his grandson the present plaintiff, until the 18th day of February last, when possession was delivered to the first defendant under the order of the Civil Court of Madura, dated the 8th February 1864.

2. The plaintiff also seeks the restoration, from the first and second defendants, of the other real and personal property, enumerated in the schedule annexed hereto and marked A, which was delivered up to the first defendant under the said order of the Civil Court of Madura. 1864. *July* 11. *R. A. No.* 188 *of* 1864.

3. The plaintiff also seeks an account of the interest and dividends, which the first and second defendants have received, or but for their wilful default and negligence might have received, upon so much of the said personal property as consisted of money and promissory notes; and for an account of the mesne profits of the zamíndárí, which the first defendant has received, or but for her wilful default and negligence might have received; and that the plaintiff may be declared entitled to receive such interest, dividends and mesne profits from the date at which the said order of the Civil Judge was executed up to the date of the decree in the present suit.

4. The plaintiff also prays that the defendants may be restrained from alienating, encumbering and charging in any way any part of the property which has come to their hands; and that a receiver may be appointed to take charge of the personal property, and to manage the zamíndárí until the decision of the present suit.

5. The cause of action accrued on the 8th day of February 1864:—

6. The subject of the plaintiff's claim is as follows.

7. The pedigree of the family, to which the parties to this suit belong, is set out in the schedule annexed hereto and marked B, to which the plaintiff begs leave to refer as part of his plaint.

8. The Sivagengé zamíndárí vested in Gauri Vallaba Tévar as his self-acquisition; by virtue of the proclamation of Lord Clive, dated 6th July 1801, and the Istimrár sanad, dated 22nd April 1803.

9. On the 7th October 1806 Gauri Vallaba Tévar, in reply to an 'ináyatnáma dated 22nd September 1806 from

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the Collector, in which information was requested as to his family and heirs, stated "in the event of my having no sons, my uterine brother's sons should, in conformity with their respective ranks, become heirs to the throne of the zámíndárí."

10. On the 17th day of June 1829 Gauri Vallaba Tévar, being on the point of death, and having no male heirs, made a will in which he declared that, in the event of his wife Parvata Vardani Náchiyár, who was then pregnant, not being delivered of a son, his nephew Muttu Vaḍuga Tévar should succeed to the zamíndárí. On the same night Gauri Vallaba Tévar died.

11. The will was communicated to the Collector and Zila' Judge by Gauri Vallaba Tévar and Muttu Vaḍuga Tévar. Its genuineness was ascertained after due inquiry by the Collector; and after Parvata Vardani Náchiyár had given birth to a daughter, the zamíndárí was, in conformity with the will, placed in possession of Muttu Vaḍuga Tévar.

12. On the 29th July 1830, the Ráni Parvata Vardani Náchiyár, Angamuttu Náchiyár, and Muttu Viray Náchiyár, entered into an agreement with Muttu Vaḍuga Tévar by which it was stipulated that he should enjoy the zamíndarí from generation into generation, by virtue of his relationship, and under the will; and that certain villages should be allotted to them. This agreement was registered and carried out.

13. After the death of Muttu Vaḍuga Tévar, which took place on the 21st day of July 1831, three suits were brought against his son and successor Bóddagurusvámi Tévar. Original Suit No. 4 of 1832 was brought by Velli Náchiyár, a daughter of Gauri Vallaba, on behalf of her minor son. Original Suit No. 3 of 1833 was brought by Angamuttu Náchiyár, claiming as a widow of Gauri Vallaba Tévar. Original Suit No. 4 of 1833 was brought by Muttu Víray Náchiyár, another widow of Gauri Vallaba Tévar, as guardian of a supposed adopted son. In all these suits the zamíndár, defendant, pleaded the will and agreement of the 29th July 1830; and filed those documents and others tending to support them.

14. Original Suits Nos. 4 of 1830 and 3 of 1833 were dismissed by the Provincial Court on the ground that the defendant was the true heir to the zamíndárí. Original Suit No. 4 of 1833 was dismissed on the ground that the adoption was not proved. In none of these three suits was any decision given upon the will or agreement.

15. The Ṣadr Court, in Regular Appeal No. 2 of 1835, confirmed the dismissal of Original Suit No. 4 of 1833, and in Regular Appeal No. 11 of 1835 confirmed the dismissal of Original Suit No. 4 of 1832. In Regular Appeal No. 13 of 1835 they reversed the judgment in Original Suit No. 3 of 1833, and awarded the zamíndárí to Angamuttu Náchiyár, on the ground that Gauri Vallaba Tévar and Oya Tévar were divided. The Court incidentally stated its opinion that the will was a fabrication, and that the agreement was not binding upon the widow. But this opinion, so far at all events as it related to the will, was extrajudicial and unnecessary to the decision of the case.

16. The decision of the Ṣadr Court was reversed by the Queen in Council, on the ground that division had not been set up in the lower Court(a). The plaintiff was allowed to bring a new suit; and their Lordships stated that "it would be "exceedingly desirable that it should be known to all those "who are interested in the property, that the question of "fact as to division or no division, appears to be the only "point on which the main question of title to this property "will ultimately depend."

17. Angamuttu Náchiyár brought a fresh suit No. 2 of 1845 against Gauri Vallaba Tévar, father of the present plaintiff, who had by that time succeeded to his brother. In his answer the then zamíndár relied upon the will and agreement as before. The plaintiff in her reply referred to the decree of the Privy Council as showing that her claim rested solely on division; and that the Court should record point on that only. The Civil Judge accordingly by his orders of the 1st March 1847 and the 30th June 1847 recorded a single point as to division or non

(a) See the judgment of the Privy Council in the Note to this report.

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division; and refused to allow the will or the documents in support of it to be filed.

18. His judgment was in favor of the defendant the zamíndár; and in it he affirmed the genuineness and validity of the agreement of 1830.

19. The appeal to the Ṣadr Court No. 7 of 1849 lapsed by the death of Angamuttu Náchiyár, and that Court refused to allow Katama Náchiyár or any of the other claimants to prosecute it.

20. Katama Náchiyár brought a fresh suit No. 10 of 1856, in his answer to which the defendant, the present plaintiff, again relied on the will and agreement. No decision on the merits was given; as the suit was dismissed on the ground that the decision in Original Suit No. 2 of 1845 was a judgment in rem. This decision was affirmed by the Ṣadr Court.

21. Katama Náchiyár appealed to Her Majesty in Council, and it was decided that she should have been allowed to prosecute the Appeal No. 7 of 1849, and that she and her sisters were entitled to recover the zámindárí, irrespective of the question of division, on the ground that self-acquisition passed to the widow in preference to male heirs.

22. Neither in Original Suit No. 2 of 1845, nor in Regular Appeal No. 7 of 1849, nor in Original Suit No. 10 of 1856 was the present plaintiff's title under the will decided on or in issue. In the Privy Council their Lordships say, "the respondent denying the forgery does not now treat "the document as a testamentary disposition or as material "to his title, and it may therefore be dismissed from con-"sideration." But even in the Privy Council the will could not be relied on, and was not adjudicated upon, as it formed no part of the record. Nor was any decision given as to the effect of the agreement of the 29th July 1830, assuming the will to be genuine.

23. The plaintiff now grounds his claim on the will and agreement as giving him a good title, notwithstanding the recent decree of Her Majesty in Council.

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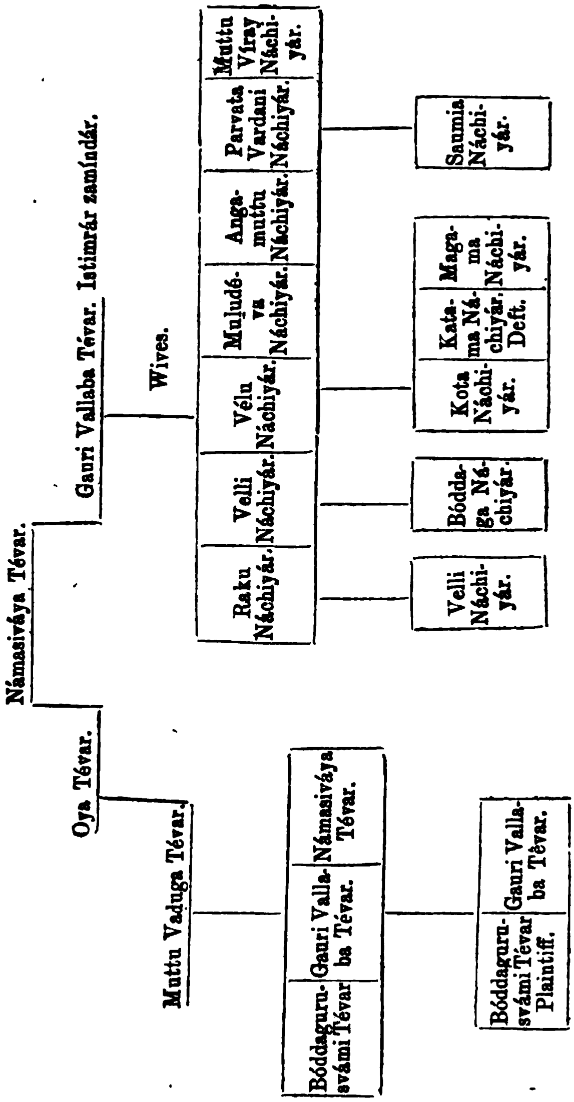
SCHEDULE B.

PEDIGREE.



The Acting Civil Judge made the following order under Act VIII of 1859, sec. 2 :—

"The question of the title to the property referred to in the plaint, as between the present plaintiff and defendants, having been disposed of by the judgment of the Lords of the Judicial Committee of the Privy Council, delivered on the 30th November 1863, it cannot now be revised on the ground set forth in the plaint. The plaint is accordingly rejected."

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The plaintiff now appealed against this order, as being wrong in law in that the plaintiff's case as made out in this suit was not adjudicated on by the Privy Council.

The Advocate General, for the appellant, the plaintiff, contended that the plaintiff was not barred by res judicata, for that the Privy Council had pronounced no direct decision upon the will, and that they could not have done so, for the will was not before them. It was urged in the reply in the suit of 1845 that such suit should be heard and decided on the point of division only: in that suit the parties were restricted to evidence on the point of division, and division or non-division was the one point decided. In the suit of 1856 no points nor issues were settled. [SCOTLAND C. J.:—But the question of right under the will was quite open to your client before the Privy Council.] Counsel in not relying on the will as such before the Privy Council were mistaken. They only put forward the view that had been previously taken of the instrument, viz. that it was a declaratory document. But they abandoned nothing. [HOLLOWAY, J. referred to a passage of Neratius cited in his judgment, infra, and observed that the law as to a cause of action applies with at least equal force to a possible exception whether taken or not.] *The Advocate General* then cited and commented on *Hunter* v. *Stewart(a)*, *Henderson* v. *Henderson(b)*, *Marchioness of Londonderry* v. *Baker(c)*; *Rattenbury* v. *Fenton(d)*: *Boileau* v. *Ruttlin(e)*. [The Chief Justice referred to *Reg.* v. *Hartington Middle Quarter(f)*, in which his Lordship had been of counsel and observed that it had not been decided on the ground of its being a settlement case.] The sole *causa petendi* in the former litigation was the ground of inheritance. *Res judicata* cannot be pleaded, when, as now, the plaintiff comes forward on a different *causa petendi*, viz. as claimant under a devisee. He also cited *Carter* v. *James(g)*, *Barrs* v. *Jackson(h)* in which, though the decision was overruled*(i)*, the Vice Chancellor's observations are untouched: *Regular Appeal No.* 10 *of* 1862*(j)*: *Marquis of Breadalbane* v. *Marquis of Chandos(k)*:

(a) 8 Jur. N. S. 317.
(b) 3 Hare, 114.
(c) 30 L. J. Ch. 895.
(d) Coop. Rep. temp. Brougham, 60.
(e) 2 Exch. 681.
(f) 4 El. & Bl. 780.
(g) 13 M. & W. 137, 146.
(h) 1 Y. & C. 585.
(i) 1 Phill. 582.
(j) 1 Mad. H. C. Rep. 312.
(k) 2 My. & Cr. 711.

Farquharson v. *Seton(m)*: *Partridge* v. *Usborne(n)*: *Chamley* v. *Lord Dunsany(o)*: *Seddon* v. *Tutop(p)*: *Lord Bagot* v. *Williams(q)* per Bayley, J. [HOLLOWAY, J. Can you put your case any higher than this, that the Civil Court did not investigate the whole of what was put before it? His Lordship referred to *Eastmure* v. *Laws(r)*.]

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[SCOTLAND, C. J. The subject-matter of the plaint does not appear to constitute a cause of action. We have held more than once that a zamíndár under the permanent settlement could not make any alienation of his zamíndárí binding on his successors unless he complied with the Regulations of 1802.]

Mayne, on the same side, contended that to make an estoppel by *res judicata* it must be shewn, not only that the point might have been, but that it was, decided. He referred to *Seddon* v. *Tutop* as establishing the position that a new suit can be brought for a portion of the same demand when that portion has not been the subject of enquiry. He also referred to and commented on *Outram* v. *Morewood(s)*: *Popham's Case,* 7 H. 6. 8, 9 cited in 3 East 361, 364: *Bainbridge* v. *Baddeley(t)*: *Newall* v. *Elliot(u)* per Martin B.

The Chief Justice and Holloway, J. then delivered oral judgments, which it is unnecessary to report, as their contents are comprised in the following written judgments.

SCOTLAND, C. J. :—The parties to this suit and to the suits in which judgment upon appeal was recently given by the Judicial Committee of Her Majesty's Privy Council are the same. The question to be considered is, whether the cause of action, upon which the present suit is brought, was finally concluded by the judgment and decree in the appeal, for, if so, the Civil Judge was right in refusing to take cognizance of the suit; and I am of opinion that the present cause of action was concluded. It can make no difference

(m) 5 Russ. 45.
(n) 5 Russ. 195.
(o) 2 Sch. & Lef. 718.
(p) 6 T. R. 607.
(q) 3 B. & C. 240.
(r) 5 Bing. N. C. 444.
(s) 3 East 353, 334.
(t) 2 Phill. 705.
(u) 32 L. J. Exch. 120, S. C, 9 Jur. N. S. 359.

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in the consideration of the question that the party now plaintiff was defendant in the former suit. What we have to be satisfied of is, that the ground of legal right, upon which the plaintiff sues, was a point raised and opened for decision in the former suits, and that it was finally dealt with by the judgment and decree.

Now the cause of action in this suit is the right of the plaintiff to recover possession of the zamíndárí as the legal representative of Muttu Vaḍuga Tévar, the devisee under the alleged "will" of Gauri Vallaba Tévar, the former zamíndár, in whom under the sanad-i-istimrár the zamíndárí vested as his self-acquisition. The whole foundation of the suit clearly is, the validity of the alleged devise to Muttu Vaḍuga Tévar, for as a ground of action, no effect, it seems to me, can now be given to the statements in the plaint as to the agreement of the 29th July 1830. Then what was the nature of the case made by the parties in the former suits, and what were the questions raised in those suits and involved in the final decision of Her Majesty in Council in the appeal?

The appeal appears to have been against the decrees and orders in the suit brought in 1845 by Angamuttu, one of the widows of the zamíndár Gauri Vallaba, and in the suit brought in 1856 by the present defendant, his second daughter; and we must look, I think, to the plaint and proceedings forming the record in both those suits. In the first, the widow in her plaint rested her claim to recover the zamíndárí from the principal defendant, the father of the present plaintiff, upon the grounds, first, that a division had taken place between her husband and the defendant's father Oya Tévar, and secondly, that the zamíndárí had become the separate self-acquisition of her husband under the grant made to him by the Government. In answer, the defendant pleaded a denial of the alleged division, and distinctly set up and relied upon his preferable right to the zamíndárí, as the next heir male in the undivided family, and also under the terms of the will of the plaintiff's husband, giving the zamíndárí to the defendant's father in default of male issue. The reply and rejoinder it is unnecessary to refer to further than to remark that although as pointed out by the appellant's Counsel, it was urged in one passage of the

reply that the suit should be heard and decided upon the point of division only, yet, the defendant in the rejoinder repeated and insisted upon the grounds of title set forth in the answer.

In the second suit of 1856 against the guardian of the present plaintiff, who had succeeded on the death of his father, the plaintiff, claiming in succession to Angamuttu, rested her title upon the same grounds. The answer of the guardian impeached the plaintiff's right as heir, and referring to many of the facts set forth in the suit of 1845, stated a number of circumstances as shewing that the infant plaintiff was the rightful heir. It does not appear to contain express mention of the alleged will, but in the rejoinder the 'arzí to the Collector is referred to, and it is stated that under the 'arzí and the will the zamíndárí had been held by those, through whom the infant claimed.

Upon these pleadings it sufficiently appears, I think, that the claim of title under the gift by "will" to Muttu Vaḍuga Tévar, was raised and made in defence as much a distinct question for decision, as it is conceded it had been in the earlier suits. It is true that the parties were restricted in the first suit to evidence upon the point of division, and that in the second suit, no points or issues were settled. But the course of proceeding in both cases appears to have resulted from the Civil Judge's opinion, that division or non-division was the only ground upon which the widow's right could be questioned. The parties were not thereby precluded from afterwards relying upon the other questions raised by the pleadings. It was quite open to the present plaintiff, as respondent in the appeals in both suits, to put forward the right claimed under the will and to have his case upon that point fully heard and determined; just in the same way as it was open to the appellant to rely (as she did successfully) upon her right to the zamíndárí, as her husband's self-acquired property, though there had been no division. Further, as the case for the appellant was presented before the Privy Council, it became obviously most material for the respondent alleging the genuineness of the will to rely, if he could, upon its validity to pass the zamíndárí, being the testator's separately acquired property, from the female heirs, and if this had been done, their

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Lordships who heard the appeal would necessarily have given judgment expressly upon the question, before deciding in favour of the appellant's right as heir. Looking then to the proceedings in the two former suits, it appears to me that the claim which is now made a cause of action was a question fully open to the plaintiff upon the appeal in those suits, and that it rested upon precisely the same circumstances as those upon which the plaintiff seeks to support the present suit—that his case as regards the will, is in truth one and the same in this and the former suits.

But it was urged that, as there was no direct decision expressed by the Privy Council upon the will, the plaintiff was not concluded. What we find, is that, on the part of the plaintiff the alleged will was not relied upon, not however, it appears, because the question of right under it was not open, but because, as a will, it was considered and admitted to be quite untenable. Their Lordships observe in their judgment that "the respondent denying the forgery does not now treat the document as a testamentary disposition or as material to his title, and it may therefore be dismissed from consideration;" and so disposing of all questions of disposition by will, their Lordships decide against the plaintiff's right to the property then in litigation, and which is now sought to be made the subject of another suit. Under these circumstances, I think, the judgment and final order in the appeal involved the decision of all claim of title under the will, and must now be considered as between the parties tantamount to an express adjudication upon such claim.

As a rule, a party, I think, is bound to bring forward his whole case in respect of the matter in litigation and open to him upon the points for decision in the suit. He is not at liberty to abstain from relying upon, still less to abandon (as in this case) a ground of claim, which is in question and proper for consideration and decision in the suit, and afterwards to make it a cause of fresh suit in respect of the same subject matter of litigation. This rule was acted upon in the case of *Henderson* v. *Henderson*(a), referred to in argument.

(a) 3 Hare 115.

Several other cases were cited from the English reports, as to which I need only observe that some of the cases turn upon questions of English pleadings, and none of them, I think, can be usefully applied as authorities to the circumstances here, except so far as they point out the principle and grounds upon which the defence of *res judicata* rests. The grounds are very clearly stated in the recent case of *Hunter* v. *Stewart(a)*, and applying the conditions which the Lord Chancellor there refers to from the commentary of Vinnius as necessary to the validity of such a defence, I think there is in this case "idem corpus, eadem quantitas, idem jus, eadem causa petendi, eadem conditio personarum."

For these reasons, I am of opinion that the final decision upon appeal in the two former suits must be considered as an adjudication in respect of the claim under the alleged will, as well as the other questions raised and that the plaintiff is concluded from bringing the present suit; and consequently that the plaint was properly rejected under section 2 of the Civil Procedure Code. The appeal therefore must be dismissed and with costs.

In the course of the argument, I alluded to another objection as arising upon the face of the plaint, namely, that its subject-matter did not constitute a cause of action, this Court having in two or three recent cases(b) decided that a zamíndár, holding under a permanent settlement, could not make any alienation of his zamíndári binding upon his legal successors, otherwise than as provided by the Regulations of 1802. It has become unnecessary to consider this objection, but I ought to observe that it is one which under section 32 of the Civil Procedure Code, the Court, I think, would have been bound to decide, before the case could properly have been remanded for trial in the Civil Court; and if the decisions just referred to be correct, it seems difficult to see how the statements in the plaint could be held to constitute a cause of action.

HOLLOWAY, J.:—It is unnecessary to repeat the nature of the pleadings, but I will first consider the decree, and then the record upon which it was made.

(a) 31 L. J. Ch. 349.
(b) See 1 Mad. H. C. Rep. pp. 141, 349 and supra p. 128.

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The decree of the Lords of the Privy Council is, that the plaintiff is entitled, as against the present appellant, then the defendant in possession, to recover the Sivagengé zamíndári. There is no question here as to the technicalities flowing from the nature of the English action of ejectment. The decree could be arrived at only by affirming all matters necessary to the proof of the plaintiff's title, and by negativing all matters, perhaps whether pleaded or not, which would enable the defendant to resist such a decree. It is unnecessary, however in justification of my judgment, to push the proposition so far, for it is quite clear that the will was pleaded by the defendant at every stage in the Court below. Then it is sought to avoid the effect of the decree by shewing that the Court, following the former judgment of the Privy Council, wholly excluded the question of this will. This is so, and if the defendant's case was substantially prejudiced by this proceeding, it would have been a good ground for an application to the superior Court for further enquiry. That Counsel in not pressing the point were mistaken, is answered by the passage of Neratius quoted by me during the Advocate General's argument, " cum de hoc, an eadem res est quæritur, hæc spectanda sunt: personæ: id ipsum de quo agitur: càusa proxima actionis: *nec jam interest, qua ratione quis eam causam actionis competere sibi existimâsset*: perinde, ac si quis, posteaquam contra eum judicatum esset, nova instrumenta causae suae repperisset(*a*)." That the law as to a cause of action applies with at least equal force to a possible exception, whether taken or not, there exists no doubt. As to the law of the subject, and the rule derivable from the numerous cases cited, there is, I believe, no difference of opinion between the bar and the court. *Hunter* v. *Stewart* followed naturally from the nature of equitable pleadings. A plaintiff cannot say generally, I am entitled to such relief, but he must allege the particular grounds upon which he seeks it, and he must further state everything which he intends to prove. The matter in that case was not " res judicata" because " the allegations and equity of the one bill are different from the allegations and equity of the other." This decision is however supposed to have over-ruled that of Wigram V.

(*a*) Dig. Lib. 44, Tit 2, Sec. 27.

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C. in *Henderson* v. *Henderson* ; but, if the actual decision in that case had been in conflict with that of the Lord Chancellor in *Hunter* v. *Stewart*, His Lordship would scarcely have said, "but I find no authority for the position in civil suits, and no case was cited at the bar, nor have I been able to find any, in which a decree of dismissal of a former bill has been treated as a bar to a new suit asking the same relief but stating a different case, giving rise to a different equity." Undoubtedly there are in *Henderson* v. *Henderson* at p. 15 some general dicta, which, unless read, as we are bound to read them, with reference to the facts of that case, would conflict with the decision in *Hunter* v. *Stewart*. The decision itself, however, discloses no conflict whatever. The plantiff in equity sought relief on account of various irregularities, alleged by him to have been committed by the Court in Newfoundland, from which an appeal lay to the Privy Council which had power to stay execution pending the appeal, and to remedy in appeal the irregularities, if any such had been committed. It was quite clear, therefore, that the plaintiff had made no case for an injunction against an action upon the colonial judgment.

Seddon v. *Tutop*(a) is a case upon which we did not remark in our oral judgments. It was an action for goods sold, and the plea was a recovery of £71-10 for the damages sustained as well by means of not performing the same identical promises, &c. The facts were that the plaintiff had given no evidence on the writ of enquiry as to the good sold. The replication denied that the promises declared upon were the identical promises, for the non-performance of which the said sum was recovered. Lord Kenyon says, "The issue was whether the damages demanded in this action have been already satisfied by the recovery in the former action, and most clearly they have not. On this narrow question, the only one raised by the pleadings both formally and substantially, justice was with the plaintiff, and the case is no authority whatever for the position, that a new suit can be brought for a position of the same demand because that portion has not for some

(a) 6 T. R. 697.

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reason been the subject of enquiry." A comparison of the plea in this case with that in *Bagot* v. *Williams*(a) will shew that this is so.

It is not for us, sitting in this Court, to comment upon the question, whether the course taken by the Lords of the Privy Council was justifiable or not. It is sufficient to say that there is a decree of a superior Court distinctly declaring that the plaintiff is against the present appellant entitled. I entertain no doubt whatever that the effect of this decree is to bar the cause of action at present set up, because it is *res judicata,* the matter of it being an exception to the plaintiff's cause of action which that decree must have over-ruled.

There is no question here of bills of review, if our procedure admitted of them, or if an inferior Court, could enter in such a bill if it were admissible. The case is simply one of a new suit, brought by a defeated defendant upon a plea which he had already pleaded in the suit in which judgment was given against him.

It is unnecessary to consider now the different positions of a plaintiff whose bill has been dismissed, and of a defendant whose plea must have been over-ruled to justify the decree passed. The case seems to me a very plain one, and this appeal must be dismissed with costs.

Appeal dismissed.

(a) 2 B. & C. 235.

Judgment of the Lords of the Judicial Committee of the Privy Council upon the appeal of Katama Náchiyár v. *the Rájá of Sivagengé, from the Sadr Díwání 'Adálat at Madras ; delivered 30th November* 1863.

Present :

Lord Justice Knight Bruce.
Sir Edward Ryan.
Lord Justice Turner.

Sir Lawrence Peel.
Sir James W. Colville.

The subject of this Appeal, and of the long litigation which has preceded it, is the zamíndárí of Sivagengé, in the District of Madura and Presidency of Madras.

This zamíndárí is said to have been created in the year 1730 by the then Nawáb of the Carnatic, in favour of one Shasavarṇa, on the extinc-

tion of whose lineal descendants in 1801 it was treated as an escheat by the East India Company, which had then become possessed of the sovereign rights of the Nabobs of the Carnatic, and was granted by the Madras Government to a person whom we shall distinguish by one of his many names as Gauri Vallaba. He had an elder brother named Oya Tévar, who predeceased him, dying in 1815. The zamíndár himself died on the 19th of July, 1829.

He had had seven wives, of whom three only survived him. Of the deceased wives the first had a daughter (since dead), who left a son named Vaduga Tévar; the second had a daughter named Bóddaga: the third had two daughters, Kota and Katama, the present appellant; and the fourth was childless. The three surviving widows were Angamuttu Náchiyár, Parvata Náchiyár, and Muttu Víray Náchiyár. Of these Parvata was enceinte at the time of her husband's death, and afterwards gave birth to a daughter named Saumia. The two others were childless.

Oya Tévar the brother left three sons, of whom the eldest was named Muttu Vaduga.

The zamíndárí is admitted to be in the nature of a principality,—impartible, and capable of enjoyment by only one member of the family at a time. But whatever suggestions of a special custom of descent may heretofore have been made (and there are traces of such in the proceedings), the rule of succession to it is now admitted to be that of the general Hindú law prevalent in that part of India, with such qualifications only as flow from the impartible character of the subject.

Hence if the zamíndár, at the time of his death, and his nephews were members of an undivided Hindú family, and the zamíndárí, though impartible, was part of the common family property, one of the nephews was entitled to succeed to it on the death of his uncle. If, on the other hand, the zamíndár, at the time of his death, was separate in estate from his brother's family, the zamíndárí ought to have passed to one of his widows, and failing his widows to a daughter, or descendant of a daughter, preferably to nephews; following the course of succession which the law prescribes for separate estate. These propositions are incontestable; but Gauri Vallaba's widows and daughters have advanced a third, which is one of the principal matters in question in this appeal. It is, that even if the late zamíndár continued to be generally undivided in estate with his brother's family, this zamíndárí was his self-acquired and separate property, and as such was descendible, like separate estate, to his widows and daughters and their issue preferably to his nephews, though the latter, as co-parceners, would be entitled to his share in the undivided property. Upon this view of the law the question whether the family were undivided or divided becomes immaterial. The material question of fact would be whether the zamíndárí was to be treated as self-acquired separate property, or as part of the common family stock.

Whichever may have been the proper rule of succession, it is certain that, if not on the death of Gauri Vallaba, at least on the failure of his male issue, being demonstrated by the birth of his posthumous daughter, his nephew, Muttu Vaduga Tévar, obtained possession of the zamíndárí. He seems to have set up an instrument which in the proceedings is called a will. On the appellant's side this is treated as a forgery. The respondent, denying the forgery, does not now treat the document as a testamentary disposition, or as material to his title; and it may therefore be dismissed from consideration. Muttu Vaduga obtained possession with the concurrence of various members of the family, and of Government and its officers, as is shown by the documents at pp. 62 and 63 of the Appendix. He afterwards obtained from the then three surviving widows the rázínáma, or agreement, set out at p. 64 of the Appendix. He continued in possession without litigation, if not without dispute, until his death, which took place on the 21st of July, 1831; and was then succeeded by his eldest son, Bóddagurusvámi Tévar.

Soon after this event began the litigation concerning this property, which has now continued upwards of thirty years. Its history may be conveniently divided into three periods: the first beginning with the institution of Suit No. 4 of 1832, and ending with the order of the Queen in Council in 1844; the second beginning from the date of that order, and

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ending with the death of the widow, Angamuttu, on the 23rd of June, 1850; and the third being that which covers the proceedings which have been had since Angamuttu died.

The Suit No. 4 of 1832 was brought by Velli Náchiyár, the daughter of Gauri Vallaba by his first wife, on behalf of her infant son Muttu Vaduga. It claimed the zamíndárí for the infant by virtue of an 'arzí said to have been sent to the Collector by Gauri Vallaba in 1822, according to which the succession would be to the son of a daughter in preference to his widows, and *a fortiori* in preference to his brother's descendants. The defence to this suit insisted that the zamíndárí had been granted to Gauri Vallaba solely in consequence of his relationship to the former zamíndárs, and was therefore to be treated as part of the undivided family estate, and, as such, descendible to the eldest of the male co-parceners in preference to any descendant in the female line from Gauri Vallaba. The reply did not raise any distinct issue as to the character of the family, whether divided or undivided, but insisted that the zamíndárí was to be regarded as the self-acquired and separate property of Gauri Vallaba, and ought to pass by virtue of the 'arzí to the plaintiff.

In 1833 two other suits were instituted against the zamíndár in possession. Of these that distinguished as No. 4 may be left out of consideration, inasmuch as the plaintiff in it rested his title on an alleged adoption by Gauri Vallaba, of which he failed to give satisfactory proof. Such a title, if established, would of course have been paramount to the claims of either the nephews or the widows.

No. 3 of 1833 is, however, the most important, with reference to this appeal, of the three suits now under consideration. It was brought by Angamuttu, the fifth wife, and the elder of the three widows of Gauri Vallaba. She set up an adoption, or *quasi* adoption, of Gauri Vallaba, by the widow of the last zamíndár of the elder line, and treated this as the consideration, or a principal consideration, for the grant of the zamíndárí made to him by the East India Company, and she insisted that Muttu Vaduga Tévar, on her husband's death, got possession of the zamíndárí, of which she was the legal heiress, by means of the forged will. The defence to this suit, so far as it related to the title of the zamíndár in possession, was substantially the same as that made to the Suit No. 4 of 1832; but it also denied the alleged forgery of the will, and insisted on the rázínáma executed by Angamuttu and the other widows to Muttu Vaduga Tévar. In her reply Angamuttu did not raise any distinct issue as to the division or non-division of the family. She submitted, as an issue of fact, that the zamíndárí had been acquired by the sole exertions and merits of her husband; and, as an issue of law, that what is acquired by a man, without employment of his patrimony, shall not be inherited by his brothers and co-heirs, but if he dies without male issue shall descend to his widows, his daughters, and parents, before going to his brothers or remoter collaterals.

These three suits were all dismissed by the Provincial Court. We have not the decree or decrees of dismissal, but it seems probable that they were heard and disposed of together. It also appears that, although there was not in any of them a distinct issue, whether Gauri Vallaba and his nephews were or were not an undivided Hindú family, some evidence was given in the Suit No. 4 of 1832 to show that he and his brother were separate in estate. There was an appeal in each of the three suits, and these were heard together, and disposed of by the decree of the Sadr Court, which is set out at p. 270 of the Appendix. That decree dismissed No. 4 of 1833 on the ground that the plaintiff had failed to prove his alleged adoption by Gauri Vallaba, and it dismissed No. 4 of 1832 on the ground that the succession to the zamíndárí was governed by the general Hindú law, and not by any particular or customary canon of descent; so that, if descendible as separate estate, it would go to the widows of Gauri Vallaba in preference of a grandson by a daughter. In the Suit No. 3 of 1832 it decided, first, that as a matter of fact the zamíndárí was the self-acquired and separate property of Gauri Vallaba: secondly, that according to the opinion of the pandits whom it had consulted, the rule of succession to the zamíndárí, though self-acquired, would depend on the fact whether the brothers had or had not divided their ancestral estate; that in the former case it

would belong to the widow, and in the latter to the nephew; thirdly, that upon the whole evidence the brothers must be taken to have divided their ancestral property; and lastly, that the plaintiff Angamuttu was entitled to recover the zamíndárí, not having forfeited her rights by the execution of the rázínáma.

Against this decree the zamíndár then in possession appealed to Her Majesty in Council. The order made on that appeal on the 19th of June, 1844, was that the decree of the Sadr Court should be reversed, with liberty to the respondent, Angamuttu, to bring a fresh suit, notwithstanding the decree of the Provincial Court, at any time within three years from the filing of that order in the Sadr Díwání 'Adálat. The grounds on which their Lordships who recommended this order proceeded were, as appears from the Judgment delivered by Dr. Lushington, that the Sadr Court had miscarried in deciding the question of division, which was not one of the points reserved in the cause, nor was expressly raised upon the pleadings, but that the respondent ought to be allowed to remedy the omission in a new suit. And their lordships added, that though they could make no order on the subject, it would be exceedingly desirable that it should be known to all those who were interested in the property that the question of division or non-division appeared to be the only point on which the main question of title to the property would ultimately depend.

On the 20th of August, 1845, Angamuttu commenced her second suit in *formá pauperis*. In the interim Bóddaguru Tévar had died; and the zamíndárí had passed to his brother Gauri Vallaba, the father of the respondent, and he with a younger brother were the defendants to the new suit. In her plaint the widow, after stating the pedigree of the family, some of the former proceedings, and the desire of Vélu Náchiyár, the widow of the last zamíndár of the elder line, to make Gauri Vallaba, the first of that name whom we have mentioned, her successor, proceeds to allege that with that object she had caused him and his elder brother Oya Tévar to make a partition of their ancestral property as early as the year 1792. The plaintiff then excuses her omission to plead this fact in the previous suit by saying that she had been advised it was only necessary for her to show that her husband had been adopted by Vélu Náchiyár, and that the zamíndárí was his self-acquisition. She then proceeds to allege that on the death of Vélu Náchiyár he actually became zamíndár until he was dispossessed by the usurpers; on whose defeat and destruction by the East India Company he was again put into possession under their grant. She also in this suit makes the alternative case that even if no partition of their ancestral property took place between Gauri Vallaba and his brother Oya, she, as the eldest widow, was entitled to the zamíndárí, as a separate acquisition, in preference to that brother's descendants, and pleads the decision in what is called the Sandaiyar case, to prove that such is the Hindú law, and that the opinion given in the former case by the Pandits to the contrary was erroneous.

In his answer the first and principal defendant recapitulated the several facts relied upon by Bóddaguru in the former suit as constituting his title. He insisted that by the decision of the Privy Council the contest was narrowed to the issue whether the brothers were undivided in estate or not, and that the plaintiff should have rested her claim on that issue. He contended that there had been no partition. The points recorded in the suit (appendix, p. 24), are thus somewhat vaguely stated :—

"The plantiff to prove, by means of documents and witnesses, that division took place in 1792. As the defence is but a denial of this circumstance, the defendant cannot be called upon to establish the negative side by direct proof. But the defendant will have to prove the points mentioned in paragraphs 2 to 5 of the answer; and he is required to use if possible, strong arguments against the points particularly spoken of by the plaintiff."

A large body of evidence is in fact given by each side on the question of division or non-division. The case was heard by the zila' Judge, Mr. Baynes, whose decree, dated the 27th of December, 1847, is at page 143 of the appendix. The effect of it was that the only question really open between the parties was that of division or non-

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division; that the plaintiff had failed to prove the partition between Gauri Vallaba and his brother Oya; and that her suit must be dismissed with costs

Against this decree, and on the 6th of April, 1848, Angamuttu appealed to the Sadr Court. The defendant Gauri Vallaba then died, and his infant son, the present respondent, came in, and on the 5th of November, 1849, filed an answer to the appeal. Before the appeal was heard, and on the 24th of June, 1850, Angamuttu also died, and with her death ended the second stage of this long litigation.

On the death of Angamuttu the Court seems to have issued a notice in the form ordinarily used on the abatement of an appeal by the death of the appellant, calling upon the heirs of the deceased to come forward and prosecute the suit. This form of notice, it is obvious, was not strictly applicable to a case like the present, where, upon the death of a Hindu widow, the right of action formerly vested in her devolves not upon her heirs, but upon the next heirs of her husband; and to this circumstance may be traced some of the confusion which is observable in the subsequent proceedings. Such as it was, however, the notice brought into the field three sets of claimants. The first consisted of Bôddaga Náchiyár, the daughter of Gauri Vallaba by his second wife, and Kota and the present appellant, his daughters by his third wife. They claimed as the rightful heirs of the zámíndarí, if it passed as separate property, next in succession to the widow Angamuttu; but considering its impartible nature, they expressed their willingness that it should be enjoyed first by Bôddaga for her life, next by Kota for her life, and lastly by the appellant. They treated Saumia, the daughter by the sixth wife, as excluded from the succession by reason of her marriage with Bôddaguru, and of her being then a childless widow.

Saumia, however, came forward by a separate petition, claiming to be heiress both to Angamuttu and the zamíndárí, by virtue of an instrument alleged to have been executed by Angamuttu in her lifetime.

A third claimant was Muttu Vaduga, the plaintiff in the dismissed suit of 1832. His contention was that though the decree in that suit may have been right in preferring to his claim that of Angamuttu, his title as grandson was nevertheless preferable to that of daughters, and that on the death of the widow he became entitled to the zamíndárí.

Counter-petitions were filed on behalf of the respondent, objecting to the revival of the appeal by any of these claimants; and it is observable that he then insisted that they ought to be compelled to bring fresh suits for the trial of their alleged rights, in order to give him the means of alleging and proving certain special matters of defence against them, of which he would not have the benefit in the suit of Angamuttu.

The Sadr Court, in dealing with these claims to prosecute the appeal, has made three different and inconsistent orders.

By the first, dated 21st October, 1850 (appendix, p. 290), it held that none of the claimants could prosecute the appeal, which it directed to be removed from the file, but left any of them at liberty to bring a new action to enforce their respective claims, provided it was commenced before the 30th of April, 1851.

They all petitioned for a review of this order; counter-petitions were filed on behalf of the respondent; and the Court, by its order of the 1st of May 1851, notwithstanding an adverse opinion given by its Pandits on the 7th of March preceding, reversed its former order, and directed the appeal to be replaced on the file, and the several claimants to be made supplemental appellants; resolving to hear the appeal, and, if it should be sustained, to determine the mode in which their rights as against each other and the defendant should be tried.

On the 19th of April 1852, the Court, apparently of its own mere motion on taking up the record of the appeal, reversed this order of the 1st of May 1851, and ruled that the several claimants could not be heard on the appeal, but might prosecute their respective rights in the court of first instance, which court was to be guided in the admission and hearing of their claims by the regulations in force; and the appeal was again removed from the file.

Thereupon the respondent shifted his ground, and by a petition dated the 30th of June 1852, objected to the last order and prayed for a review

of it. His contention then was, that the heirs next in succession to Angamuttu, according to that course of succession, might have been admitted to carry on the appeal, and that it was a hardship on him to have to litigate his title with them in a new suit. The Court, however, by its proceeding of the 16th of September 1852, adhered to its order, giving at the same time a not very intelligible explanation of it.

Of the three daughters of Gauri Vallaba who joined in the first of the abovementioned applications to the Sadr Court, the appellant alone brought a fresh suit. The plaint was not filed until the 5th of December 1856, but there seem to have been various intermediate proceedings before both the zila' and Sadr Courts. These are referred to in the appellant's petition of appeal at page 260 of the Appendix, line 51, but are nowhere stated in detail. Her plaint stated that her father and his brother Oya Tévar were divided in estate prior to 1801, and were then living separately; that the zamíndárí was granted exclusively to the former, and was therefore his self-acquisition and enjoyed by him in exclusion of his brother.

The appellant's title in succession to Angamuttu is thus stated:—"The zamíndárí, which is the self-acquisition of the plaintiff's father after his division with Oya Tévar, belongs on the death of his widow Angamuttu to his second daughter the plaintiff, who has male and female issue; whilst his first daughter Bóddaga has no issue, and the third daughter Saumia is a widow." In the seventh paragraph (Appendix, p. 251), (though the point is not taken so distinctly as in the suit of Angamuttu) she claims the zamíndárí as her father's self-acquisition irrespectively of the alleged partition with his brother, and the question of division.

The answer took a formal objection to the suit, viz., that it was brought against the guardian of the infant zamíndár, and not, as it ought to have been, against the infant jointly with his guardian. It also insisted on the Regulation of limitation and the decree of the 17th of December 1847, as bars to the appellant's claim. It further impeached her title as the heir next in succession to Angamuttu in that line of succession, alleging that there were descendants of Gauri Vallaba through his elder widows, and it again pleaded many of the facts put in issue in the suit of 1845 as constituting the title of the infant zamíndár. The estate being then in the custody of the Court of Wards, the Collector was made a defendant, and put in a similar answer. Replies and rejoinders were filed; but without settling any issues or taking any evidence in the cause, the zila' Judge (Mr. Cotton) on the 25th of August 1859, dismissed the suit, together with the Suit No. 4 of 1857, which had been instituted by Saumia, but with which we have no concern. His reasons for dismissing the appellant's suit were:—first, that upon the question of division she was concluded by the decree of 1847, which he treated as a judgment *in rem*, made final by the removal of the appeal from the file; and, secondly, that it was clear upon the opinions of the Paṇḍits, that the zamíndárí, whether self-acquired or not, could not descend to the widow, nor, *à fortiori*, to a daughter, except in the event of the zamíndár having been of a divided family.

The appellant appealed from this decision to the Sadr Court, praying that the suit might be remanded for adjudication on the merits. Her appeal was dismissed by a decree dated the 5th of November 1859. The Sadr Court seems also to have considered that by the dropping of the appeal on Angamuttu's death the decree of 1847 had become final, and, as such, was an effectual bar to the appellant's claim. On the 3rd of March 1860, the Sadr Court refused to give the appellant leave to appeal to Her Majesty in Council; but special leave was afterwards given on the recommendation of the Committee.

The present appeal is against the decree of the Sadr Court of the 5th of November 1859, and its order of the 3rd of March 1860, and the decree of the 25th of August 1859. It is also against the order of the Sadr Court of 1852, and the decree of the Civil Court of Madura of 27th December 1847. If, therefore, the latter decree is in truth a bar to the appellant's obtaining effectual relief in her original suit, the appeal seeks by re-opening that decree to remove the bar.

And here, before going further, their Lordships deem it right to remark shortly upon the extraordinary doctrine touching this decree which was

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propounded by the zila' Judge when dismissing the suit of 1856; because if unnoticed here, as it seems to have been unnoticed by the Sadr Court, it may find acceptance with other unprofessional Judges and embarrass the course of justice in India. Their Lordships would otherwise think it unnecessary to observe that a judgment is not a judgment *in rem*, because in a suit by A for the recovery of an estate from B it has determined an issue raised concerning the *status* of a particular person or family. It is clear that this particular judgment was nothing but a judgment *inter partes*; and the only question which could properly arise concerning it in the suit of 1856 was to what extent, as such, it was binding on the appellant.

Their Lordships also feel constrained to observe that the various proceedings which have taken place since Angamuttu's death have signally failed to do justice between the parties, or to dispose of the matters in dispute between them by anything approaching to a regular course of trial and adjudication. When Angamuttu died the decree of 1847 was not a final decree. An appeal was pending against it. Either it was binding upon those who in the event of her title being a good one would succeed to the zamíndárí, or it was not. Those persons were obviously not her heirs, but the next heirs of her husband according to the canon of Hindú law, which defines the succession to separate estate. It ought not, their Lordships conceive, to have been a difficult matter to ascertain the persons answering to this description. If the decree were in its nature binding on them, they, when ascertained, ought to have been allowed to prosecute the appeal. If the decree were not binding upon them, it ought not to have been treated as an obstacle to the full trial and adjudication of their rights in an original suit. The Sadr Court, however, after making two other and inconsistent orders, referred the parties to an original suit; and yet a suit of that nature when brought by the appellant has been since disposed of against her summarily, and without taking evidence, on the ground that the main and essential issue in it was concluded by the decree of 1847. Therefore she has fallen, so to speak, between two stools. She has had neither the benefit of the appeal against the decree of 1847, nor a fair trial of her right in a new suit.

It has been ingeniously argued here that for this result the appellant is herself solely responsible; that the suit which she ought to have brought, and which the Sadr Court intended her to bring, was one in the nature of a bill of revivor, or a bill of revivor and supplement, limited to the object of obtaining from the zila' court a declaration that she had established her title to stand in the place of Angamuttu, and carry on the former suit. Whether the procedure of the courts of the East India Company admitted of such a suit (and no precedent of one has been produced,) their Lordships are not prepared to say. But they have a very strong and clear opinion that such was not the nature of the suit which the Sadr Court had in its contemplation when it made its order of 1852. The omission to reserve the hearing of this appeal until the determination of the new suit; its removal from the file, which seems to be tantamount to its dismissal for want of prosecution, and has been so treated in these proceedings; the contention of the respondent himself in his counter-petitions filed in opposition to the first applications for leave to prosecute the appeal,—all point to the conclusion that the new and original suit intended was one in which the whole title of the claimants should be again pleaded and litigated.

The subsequent and obscure Order of the 16th of September 1852, (Appendix, p. 248) is hardly inconsistent with this, though it seems to contemplate that the decree of 1847 might prove an effectual bar to the suit which the Court itself had directed. Yet if there was ground for this apprehension, in what a position had the Sadr Court placed the claimants? It had denied to them the power of prosecuting the appeal; it had thereby made final that which was not in its nature final; and having thus tied their hands, it sent them to wage a contest in a new suit in which, so bound, they could not but fail. If, therefore, the decree of 1847, when final, was binding on the claimants, the Sadr Court ought either to have dealt with the appeal on the merits, or it ought to have declared the claimants at liberty to bring and prosecute the new suit, notwithstanding that decree.

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In either view of the case, therefore, there was a grave miscarriage of justice in the earliest order of the Ṣadr Court which is appealed against, viz., that of the 19th of April 1852.

It seems, however, to be necessary, in order to determine the mode in which this appeal ought to be disposed of, to consider the question whether the decree of 1847, if it had become final in Angamuttu's lifetime, would have bound those claiming the zamíndárí in succession to her. And their Lordships are of opinion that, unless it could be shown that there had not been a fair trial of the right in that suit—or, in other words, unless that decree could have been successfully impeached on some special ground, it would have been an effectual bar to any new suit in the zila' Court by any person claiming in succession to Angamuttu. For assuming her to be entitled to the zamíndárí at all, the whole estate would for the time be vested in her, absolutely for some purposes, though, in some respects, for a qualified interest: and until her death it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the Courts of this country as to tenants in tail representing the inheritance, would seem to apply to the case of a Hindu widow; and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow.

But, then, assuming that the succeeding heirs would be so bound, it was strongly insisted on the part of the respondent that this Committee can do no more than remand the cause, with directions to the Ṣadr Court to hear and determine the appeal against the decree of 1847; that it cannot itself deal with the merits of a decree of a zila' Court, until they have been determined by the appellate Court. Their Lordships, however, are not of that opinion. The appeal was ripe for hearing by the Ṣadr Court. Their Lordships have before them all the materials for a decision upon the merits, which have been fully argued before them. They conceive, therefore, that they are not bound to yield to this technical objection. On the contrary, they think that it is competent to them to advise Her Majesty to make the order which the Ṣadr Court ought to have made in 1852, and that it is their duty to do so.

The substantial contest between the appellant and the respondent is, as it was between Angamuttu and the respondent's predecessors, whether the zamíndárí ought to have descended in the male and collateral line; and the determination of this issue depends on the answers to be given to one or more of the following questions :—

1. Were Gauri Vallaba and his brother undivided in estate, or had a partition taken place between them ?

2. If they were undivided, was the zamíndárí the self-acquired and separate property of Gauri Vallaba ? And if so—

3. What is the course of succession according to the Hindú law of the south of India of such an acquisition, where the family is in other respects an undivided family ?

Upon the first question their Lordships are not prepared to disturb the finding of Mr. Baynes in the decree of 1847. There are undoubtedly strong reasons for concluding that Gauri Vallaba and his brother, after the acquisition by the former of the zamíndárí, lived very much as if they were separate. But this circumstance is not necessarily inconsistent with the theory of non-division, if, as was likely, the family and undivided property was very inconsiderable in comparison of the separately-enjoyed zamíndárí. And Angamuttu, having admitted that the brothers had been joint in estate, and alleged a partition at a particular place and time, took upon herself the burthen of proving that partition ; a burthen from which it must be admitted she has not satisfactorily relieved herself. Nor can their Lordships in considering this question be unmindful of the presumption which arises from the lateness of the period at which the allegation of division was first made ; and from the silence of the parties in the suits of 1832 and 1833, as well as in the suit of 1823, which is mentioned in these proceedings, upon the subject of a partition which, if it had ever taken place, must have been in the knowledge of all the members of the family.

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The second question their Lordships have no hesitation in answering in the affirmative. Every Court that has dealt with the question has treated the zamíndárí as the self-acquired property of Gauri Vallaba. Their Lordships conceive that this is the necessary conclusion from the terms of the grant, and the circumstances in which it was made. The mere fact that the grantee selected by Government was a remote kinsman of the zamíndárs of the former line does not, their Lordships apprehend, bring this case within the rule cited from Strange's *Hindú Law* by Sir Hugh Cairns.

The third question is one of nicety and of some difficulty. The conclusion which the Courts in India have arrived at upon it, is founded upon the opinion of the Paṇdits, and upon authorities referred to by them. We shall presently examine those opinions and authorities; but before doing so, it will be well to consider more fully the law of inheritance as it prevails at Madras and throughout the southern parts of India, and the principles on which it rests and by which it is governed. The law which governs questions of inheritance in these parts of India is to be found in the Mitákshará, and in chapter 2, section 1, of that work the right of widows to inherit in default of male issue is fully considered and discussed.

The Mitákshará purports to be a commentary upon the earlier institutes of Yájñavalkya; and the section in question begins by citing a text from that work, which affirms in general terms the right of the widow to inherit on the failure of male issue. But then the author of the Mitákshará refers to various authorities which are apparently in conflict with the doctrines of Yájñavalkya, and, after reviewing those authorities, seeks to reconcile them by coming to the conclusion "that a wedded wife, being chaste, takes the whole estate of a man, who, being separated from his co-heirs, and not subsequently re-united with them, dies leaving no male issue." This text, it is true, taken by itself, does not carry the rights of widows to inherit beyond the cases in which their husbands have died in a state of separation from their co-heirs, and leaving no male issue; but it is to be observed that the text is propounded as a qualification of the larger and more general proposition in favour of widows; and, consequently, that in construing it, we have to consider what are the limits of the qualification, rather than what are the limits of the right. Now the very terms of the text refer to cases in which the whole estate of the deceased has been his separate property, and, indeed, the whole chapter in which the text is contained, seems to deal only with cases in which the property in question has been either wholly the common property of an united family, or wholly the separate property of the deceased husband. We find no trace in it of a case like that before us, in which the property in question may have been in part the common property of a united family, and in part the separate acquisition of the deceased; and it cannot, we think, be assumed that because widows take the whole estates of their husbands when they have been separated from, and not subsequently re-united with, their co-heirs, and have died leaving no male issue, they cannot, when their husbands have not been so separated, take any part of their estates, although it may have been their husband's separate acquisition. The text, therefore, does not seem to us to govern this case.

There being then no positive text governing the case before us, we must look to the principles of the law to guide us in determining it. It is to be observed, in the first place, that the general course of descent of separate property according to the Hindú law is not disputed. It is admitted that, according to that law, such property descends to widows in default of male issue. It is upon the respondent, therefore, to make out that the property here in question, which was separately acquired, does not descend according to the general course of the law. The way in which this is attempted to be done, is by showing a general state of co-parcenaryship as to the family property; but assuming this to have been proved, or to be presumable from there being no disproof of the normal state of co-parcenaryship, this proof, or absence of proof, cannot alter the case, unless it be also the law that there cannot be property belonging to a member of an united Hindú family, which descends in a course different from that of the descent of a share of the property held in union; but

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such a proposition is new, unsupported by authority, and at variance with principle. That two courses of descent may obtain on a part division of joint property, is apparent from a passage in Macnaghten's "Hindú Law," title "Partition," vol. i, page 53, where it is said as follows: "According to the more correct opinion, where there is an undivided residue, it is not subject to the ordinary rules of partition of joint property. In other words if at a general partition any part of the property was left joint, the widow of a deceased brother will not participate, notwithstanding the separation, but such undivided residue will go exclusively to the brother."

Again, it is not pretended that on the death of the acquirer of separate property, the separately acquired property falls into the common stock, and passes like ancestral property. On the contrary, it is admitted that if the acquirer leaves male issue, it will descend as separate property to that issue down to the third generation. Although, therefore, where there is male issue, the family property and the separate property would not descend to different persons, they would descend in a different way, and with different consequences; the sons taking their father's share in the ancestral property subject to all the rights of the co-parceners in that property, and his self-acquired property free from those rights. The course of succession would not be the same for the family and the separate estate; and it is clear, therefore, that according to the Hindú law there need not be unity of heirship.

But look more closely into the Hindú law. When property belonging in common to a united Hindú family has been divided, the divided shares go in the general course of descent of separate property. Why, it may well be asked, should not the same rule apply to property which from its first acquisition has always been separate? We have seen from the passage already quoted from Macnaghten's "Hindú law," that where a residue is left undivided upon partition, what is divided goes as separate property; what is undivided follows the family property; that which remains as it was, devolves in the old line; that which is changed and becomes separate, devolves in the new line. In other words the law of succession follows the nature of the property and of the interest in it.

Again, there are two principles on which the rule of succession according to the Hindú law appears to depend: the first is that which determines the right to offer the funeral oblation, and the degree in which the person making the offering is supposed to minister to the spiritual benefit of the deceased; the other is an assumed right of survivorship. Most of the authorities rest the uncontested right of widows to inherit the estates of their husbands, dying separated from their kindred, on the first of these principles (1 Strange, 135). But some ancient authorities also invoke the other principle. Vṛhaspati (3 Dig. 458, tit. ccccxix; see also Sir William Jones' paper cited 2 Strange, 250) says: "Of him whose wife is not deceased half the body survives; how should another take the property while half the body of the owner lives?" Now if the first of these principles were the only one involved, it would not be easy to see why the widow's right of inheritance should not extend to her husband's share in an undivided estate. For it is upon this principle that she is preferred to his divided brothers in the succession to a separate estate. But it is perfectly intelligible that upon the principle of survivorship the right of the co-parceners in an undivided estate should override the widow's right of succession, whether based upon the spiritual doctrine or upon the doctrine of survivorship. It is, therefore, on the principle of survivorship that the qualification of the widow's right established by the Mitákshará, whatever be its extent, must be taken to depend. If this be so, we can hardly in a doubtful case, and in the absence of positive authority, extend the rule beyond the reasons for it. According to the principles of Hindú law there is co-parcenaryship between the different members of a united family, and survivorship following upon it. There is community of interest and unity of possession between all the members of the family, and upon the death of any one of them the others may well take by survivorship that in which they had during the deceased's lifetime a common interest and a common possession. But the law of partition shows that as to the separately acquired property of one member of a united family, the other members of that family have neither community of interest nor unity

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of possession. The foundation, therefore, of a right to take such property by survivorship fails; and there are no grounds for postponing the widow's right to inherit it to any superior right of the co-parceners in the undivided property.

Again, the theory which would restrict the preference of the co-parceners over the widows to partible property is not only, as is shown above, founded upon an intelligible principle, but reconciles the law of inheritance with the law of partition. These laws, as is observed by Sir Thomas Strange, are so intimately connected that they may almost be said to be blended together ; and it is surely not consistent with this position that co-parceners should take separate property by descent, when they take no interest in it upon partition. We may farther observe that the view which we have thus indicated of the Hindú law is not only, as we have shown, most consistent with its principles, but is also most consistent with convenience.

A case may be put of a Hindú being a member of an united family having common property, and being himself possessed also of separate property. He may be desirous to provide for his widow and daughters by means of the separate property, and yet wish to keep the family estate undivided. But if the rule contended for were to prevail, he could not effect his first object without insisting on the partition, which, *ex hypothesi*, he is anxious to avoid.

The case standing thus upon principle, we proceed to consider the opinions of the pandits and the authorities referred to by them.

The case appears to have been referred to the pandits on several occasions. The first of these references was made by the zila' Court in 1833, in the suit No. 4 of 1832. The answer of the pandits bears date the 28th of October in that year, and is at pages 311 and 312 of the Appendix. It is unnecessary, however, to examine this particularly, since whatever is there laid down is included in the fuller statements which will be next considered.

These fuller statements were made by the same pandits in answer to references directed by the Sadr Court before making the decree of the 17th of April, 1837. The answers are dated the 28th of December, 1863, and the 16th of January, 1837, and are at pages 141 and 272 of the Appendix.

On examiming the reasons on which the pandits rest their opinions, it is to be observed that they proceed upon the assumption that the texts cited by them apply to the case which they were called upon to consider. They seem to have done so, both as to the passages cited from Vṛihaspati and as to the text in the Mitákshará to which they refer; but they leave untouched the question which they ought to have considered, whether these authorities do or do not affect this particular case. What we have already said as to the text from the Mitákshará, and what we shall presently say as to the passages from Vṛhaspati, is, we think, a sufficient answer to this part of the reasons on which the pandits found their opinion. Then, again, they point to the distinction between obstructed and non-obstructed heritage ; and because the widow's right is not mentioned as obstructing the heritage, they infer that she cannot be entitled.

But the whole of this last argument seems to be founded on the passages in the Mitákshará contained in clauses 2 and 3 of section 1, chapter 1 ; and these passages, when examined, clearly appear to be mere definitions of "obstructed" and "non-obstructed heritage," and to have no bearing upon the relative rights of those who take in default of male issue. If, indeed, the argument which the pandits have raised upon these passages be well founded, it would, as it seems, prevent the widow from taking in any case.

It remains, then, to consider the authorities on which the pandits rely in support of their opinions. They consist of the text from the Mitákshará, to which we have already so frequently referred, and of passages from Vṛihaspati and several other commentators on the Hindú law. We have already intimated our opinion that the text from the Mitákshará does not apply to this case, and as to the passages from the commentators they are all of equivocal import. They may or may not have been intended to apply to a case like the present, and if there was nothing more to be found upon the subject they might or might not be thought sufficient to

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warrant the opinion which the pandits have founded upon them; but these passages, seem to be the same passages, or passages similar to those, which were brought forward before the time of the Mitákshará, to show that widows were not entitled even where the property was wholly separate. We may instance the passage from Nárada. These authorities failed when contrasted with conflicting passages in the works of other commentators, of which the pandits in this case have taken no notice, to negative the right of the widow where the property was wholly separate; and as they have failed to this extent, we cannot but think that the pandits in this case have gone much too far in bringing them forward as uncontradicted authorities in favour of the opinion which they have formed that the widows are not, in this case, entitled to the separately acquired property. It seems to us, too, that the decision in the Sandayar case—a decision also founded on the opinion of the pandits of the Sadr Court—is wholly at variance with the opinion of the pandits in the present case. Whether the pandits in that case were or were not right in the opinion that the zamíndárí became the separate property of the uncle by the transaction between him and his nephew, it is quite unnecessary to consider. All that is important to be considered is, that holding the zamíndárí to have become the separate property of the uncle, they held that the widows of the uncle's son became entitled to it, and that the Court followed that opinion. The pandits in the present case, attempt to reconcile the conclusions at which they have arrived with the opinion given by the pandits in the Sandayar case, by assuming that the pandits in that case proceeded upon an idea that the descendants of the common ancestor had been separated, but we see no foundation whatever for that assumption. On the contrary, the facts of the case seem to us to negative it. If, indeed, there had been any such separation, we do not see how there could have been any question as to the rights of the widows.

The case therefore stands thus upon the authorities. On the one hand, we have the opinions of the pandits in this case, which seem never to have been acted upon by any *final* decree. On the other hand, we have the decision in the Sandayar case, and the other authorities cited for the appellants at the Bar, particularly the passage from Manu, in Sir William Jones' paper given at 2 Strange, page 253, and the opinion of the pandit Kistnamáchári (2 Strange, p. 231), the latter and material portion of which is not open to the objection taken to the passage which precedes it by Messrs. Colebrooke and Dorin.

In this state of things their Lordships cannot but come to the conclusion that the balance of authority, as well as the weight of principle, is in favour of the appellant's contention.

We proceed, then, to consider how the Sadr Court ought to have dealt with this case after Angamuttu's death, and we are of opinion that that Court ought, upon the applications made by the different parties claiming to prosecute the appeal, to have determined which of the parties was so entitled. We are of opinion that Saumia and the grandson were not so entitled, and that their claims therefore ought at once to have been dismissed. The claims of the appellant and her two sisters were founded on a right common to them as against the respondent; and we think that the Court ought to have held them entitled to prosecute the appeal without prejudice to their rights *inter se*, founded upon the agreement which appears to have been entered into between them. It would then have been open to the Court to decide the case upon the merits; and upon the merits we are of opinion, for the reasons above given, that the appellant and her sisters were well entitled to the zamíndárí as against the respondent. We have, of course, not failed to consider the Judgment of this Committee in 1844. Nor have we failed to observe that, in a recent edition of his Treatise on the Hindú law of inheritance, Mr. Strange, one of the Judges of the Sadr Court of Madras, has expressed an opinion adverse to the conclusion at which we have arrived. But we think it probable that the case was not so fully discussed and examined in 1844 as it has been on the present hearing; and, at all events, we do not feel ourselves justified in holding the appellant bound by the opinion which was then expressed; which, though of course entitled to the greatest

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possible respect, was not necessary to the decision then arrived at. And as to the opinion expressed by Mr. Strange, it seems to rest upon the opinions of the pandits, and the proceedings of the Courts which we have now been called upon to review. If that opinion had been supported by a uniform course of decisions, we should perhaps have felt some difficulty in contravening it; but as the case stands upon the authorities, we feel bound to give effect to the conclusion at which we have arrived.

We shall therefore humbly recommend Her Majesty to reverse the Decrees and Orders complained of by this appeal; to declare that the suit of 1856, which appears to us to have resulted from erroneous directions given by the Sadr Court, ought to have been and ought to be dismissed; and in the suit of 1845 to declare that Saumia and Muttu Vaduga were not, nor was either of them, but that the appellant and her sisters were, as against the respondent, entitled to prosecute the appeal, and to recover the zamíndárí—this declaration to be without prejudice to the rights of the appellant and her sisters *inter se*; and, further, to declare that an account ought to have to have been and ought to be directed of the rents and profits of the zamíndárí received by the respondents, or by his order, or for his use, since the death of Angamuttu, with directions for payment to the parties entitled of what should be found due upon the account; and also to declare that the zamíndári ought at once to be put into the hands of the Collector, or of a receiver to be appointed by the Court, with liberty to the appellant and her sisters, or any of them, to apply to the Court as they may be advised. We shall further recommend that the case be remitted to the Sadr Court, with directions to carry these declarations into effect; but we shall not recommend that any costs be given of the suit of 1856, or of this appeal, or of any of the proceedings below. But any costs to which the appellant has been subjected must be refunded.

Appellate Jurisdiction (a)

Regular Appeal No. 20 *of* 1864.

SVA'MI NA'YUDU..............................*Appellant.*
SUBRAMA'NIA MUDALI.......................*Respondent.*

To sustain an action for negligence, there must be an obligation on the part of the defendant to use care and a breach of that obligation to the plaintiff's injury.

'Injury' is an act contrary to law.

To sustain an action for malicious prosecution, the prosecution must have been malicious and without reasonable or probable cause.

1864. *July* 14. *R. A. No.* 20 *of* 1864.

THIS was a regular appeal from the decree of A. W. Phillips, the Civil Judge of Chingleput, in Original Suit No. 11 of 1860, which was brought against the second defendant, Tahsíldár of Sydapet. The plaint alleged that, in consequence of the defendant misreporting that an order

(a) Present Phillips and Holloway, J J.

of the magistrate of Chingleput for the removal of a portion of a building by which the plaintiff had obstructed the public road, had not been carried into effect, a further order was passed and a portion of the plaintiff's verandah pulled down by the order of the magistrate. For this the plaintiff sought damages.

1864. July 14. R. A. No. 20 of 1864.

The first defendant, the late collector of Chingleput, answered that the act was wrongful, but that he was not responsible for his predecessor's order.

The second defendant answered that his report was true, and that what he had done was on the order of his superior, the magistrate, who himself had witnessed the execution of it.

The Civil Judge considered it proved that the orders of 1853 referred to, had been fully carried out, and that the loss to the plaintiff had resulted from the negligence of the Taḥṣíldár in not properly examining his own records, and that the defendant was consequently liable in damages.

The second defendant now appealed.

Mayne, (with him *Rájágópáláchárlu*) for the appellant.

Ritchie (with him *Rangácháriyár*) for the respondent, the plaintiff.

After stating the above facts the judgment of the Court was delivered by

HOLLOWAY, J.:—The frame of this plaint is most singular. It is not alleged that the order passed, under which the defendant manifestly acted, was illegal. It is not even alleged that the defendant was actuated by any malicious motives in the matter, and he has been held liable in damages, because he is supposed to have mis-stated a fact, which led to a magisterial enquiry, upon which the order of the magistrate was passed under Act XXI of 1841. From that order the defendant presented an appeal to the session court, which was rejected, because not presented within the period allowed for an appeal. This sufficiently explains why the act done is not impeached as illegal. It is obvious that the proceedings of the magistrate within his jurisdiction, would have been a sufficient answer. The notice was duly issued, and every step regularly taken, and according to the evidence

1864. July 14. R. A. No. 20 of 1864.

of the late magistrate Mr. Shubrick himself, that order was executed in his own presence. There has not been an attempt to show that anything was done in excess of the order, or that the land from which the verandah was removed was not part of the high road, and that the building of the plaintiff was not an unlawful obstruction.

Conceding, for the purposes of this argument, that the plaintiff was guilty of negligence in the report made, he could in no way be liable in this action. The doctrine is clearly stated by Wilde B. in *Swan* v. *North British Australasian Company(a)*, in which, however, the learned Baron must now be considered to have wrongly applied it to the facts of that case. "The action for negligence proceeds upon the idea of an obligation on the part of the defendant to use care, and a breach of that obligation to the plaintiff's injury." The fallacy of the Civil Judge's reasoning, arises from his confounding the wholly distinct juridical notions of injury, and damage. To give rise to any action whatever there must be an injury, and an injury is simply an act which is contrary to law. Here the act was done under the authority of the law itself, and not only is it not even alleged to be otherwise than legal, but the evidence clearly shows, if that were necessary as it is not, that the order of the magistrate was a correct order.

The allegation that, through the representation of the defendant, the plaintiff was fined 10 rupees, seems intended loosely to suggest a case of malicious prosecution. The law on this subject is perfectly clear; the prosecution must be malicious and without reasonable and probable cause(b). No man, even if actuated by the greatest ill will, can be liable in an action, if there was reasonable and probable cause for the prosecution ; and still less where, as in this case, the conviction of the offender is conclusive evidence that there was such cause.

If, however, this plaint had been framed for the trespass, it is clear that the defendant would have had a good justification. We must not be supposed to think that any

(a) 31 L. J. Ex. 425 : 32 L. J. Ex. 273 : 7 Hurls. & Nor. 603.
(b) See per Patteson J. in *Turner* v. *Ambler* 10 Q. B. 257.

negligence is imputable to the defendant. So far as the evidence discloses, his representation appears to have been perfectly correct, and we are of opinion that he has been subjected, mainly by the course taken by the Revenue authorities, to undeserved vexation and expense. The decree of the Court below must be reversed, and the original suit dismissed. All costs will be paid by the plaintiff below.

1864. *July* 14. *R. A. No.* 20 1864.

Appeal allowed.

Appellate Jurisdiction (a)

Special Appeal No. 479 *of* 1863.

KELLU ERADI..............................*Appellant.*

PUAPALLI and others....................*Respondents.*

An otti-holder, like a káṇamdár, forfeits his right to hold for twelve years, by denying the janmí's title.

THIS was a special appeal against the decree of H. D. Cook, Civil Judge of Calicut, in Appeal Suit No. 406 of 1862, affirming the decree of the District Munsif of Ernád, in Original Suit No. 700 of 1860.

1864. *July* 21. *S. A. No.* 479 *of* 1863.

The plaintiff sued to redeem certain lands assigned on otti by his deceased father Parameçvara Nambúdiri and others to the first defendant on 22nd Tulam 1027 (6th Nov. 1851). The first defendant admitted that the otti had been made, but pleaded that in the same month and year Parameçvara Nambúdiri had executed a document No. 2 assigning the lands in question to him with other property on a perpetual lease with an agreement giving him the option to purchase the janmí right in the event of their being sold. The Munsif and on appeal, the Civil Judge, discredited the document No. 2 and decreed for the plaintiff. The heir of the first defendant now specially appealed on the ground that a suit could not be brought to recover land demised on otti before the lapse of twelve years from the date of the otti.

The High Court dismissed the appeal, observing that an otti-holder, like a káṇamdár, forfeited his right to hold for twelve years by denying his janmí's title.

Karuṇógara Manavan, for the appellant.

(a) Present Frere and Holloway, J J.

Appellate Jurisdiction (a)

Special Appeal Nos. 223, 224, *and* 259 *of* 1864.

KALLATI KUNJU MENON........................*Appellant.*

PALAT ERRACHA MENON.........................*Respondent.*

By the law of Malabar all acquisitions of any member of a family, which he has not disposed of in his life-time form part of the family property.

The acquirer however may during his life-time hold, alienate at once, and incumber his self-acquisitions.

Special Appeal No 378 *of* 1863, affirmed.

A káraṇavan in possession of the family funds is presumed to have made all acquisitions with them and for the benefit of the corporate body. But such presumption is not irrebuttable, and his alienation or charge of such acquisitions made during his lifetime may be valid.

1864. *August* 1. *SS. AA. Nos.* 223, 224, *and* 259 *of* 1864.

THESE were special appeals against the decrees of the Principal Ṣadr Amín's Court of Calicut in Regular Appeals Nos. 485, 486, and 484, of 1862, confirming the decrees of the District Munsif's Court of Nedunganad in Original Suit Nos. 665, 679, and 585 of 1858, respectively.

These were suits by the head of a Malabar family to recover land in possession of the son of a former head.

The defence set up was, that the land was the self-acquisition of the deceased, and that, during his life-time, he had alienated it to the defendants.

The lower Courts declared the alienation void, but gave no decision upon the questions whether the property was self-acquired, and if so, whether it was alienated during the life-time of the acquirer?

Mayne, for the special appellant, contended that an anandravan might alienate during his life-time self-acquisition even of immoveable property, and cited his MS. note of the unreported decision in *Special Appeal No.* 378 *of* 1863, heard on 13th June 1863 before Phillips and Holloway, J J.

" Self-acquisitions of land by a member of a tarawáḍ are his separate property during his life and may be charged by him for his personal debts. After his death they lapse into the tarawáḍ property, but if accepted by the members they carry their obligations along with them."

(a) Present Scotland, C. J. and Holloway, J.

Srínivásácháriyár, for the respondent, cited *Special Appeals Nos.* 88 *of* 1859*(a)* and *No.* 85 *of* 1860*(b)*. 1864. *August* 1. *SS. AA. Nos.* 223, 224, *and* 259 *of* 1864.

PER CURIAM :—It is unquestionably the law of Malabar that all acquisitions of any member of a family undisposed of at his death form part of the family property, that they do not go to the nephews of the acquirer but fall, as all other property does, to the management of the eldest surviving male.

It is, however, as unquestionable law that the acquirer is fully entitled to hold, incumber and dispose during his life-time of his self-acquisitions. That doctrine, of the soundness of which we entertain no doubt whatever, was laid down by this Court in a case unfortunately not reported, and is unquestionably in accordance with usage, for, in all the reckless litigation of Malabar, one member of the Court with the judicial experience of several years does not remember an instance of a káraṇavan attempting to get into his own hands the self-acquired property of a junior member.

That a káraṇavan, who is in possession of the family funds, will be supposed to have made all acquisitions with them, and for the benefit of the corporate body, is unquestionable. It is also clear that it lies upon those who assert such self-acquisitions to make them out by the most satisfactory evidence, so strong is the presumption in the case of a káraṇavan against self-acquisition. When once established, however, we are perfectly satisfied that an alienation, charge or other disposition to take effect at once, made during his life-time, will be perfectly valid. We therefore refer these cases to the lower appellate Court for the determination of the following issues:—

I. Was the property the self-acquisition of the deceased káraṇavan ?

II. Did he alienate it to the defendants during his life-time ?

Cases referred.

(*a*) Mad. Ṣadr Dec. 1859, p. 226. (*b*) Mad. Ṣadr Dec. 1860, p. 133.

Appellate Jurisdiction (a)

Civil Petition No. 73 *of* 1863.

Ex parte RAU NARASINGA.

Act XXVII of 1860 observed upon.

Certificates under that act can only be granted to persons claiming to be representatives of deceased persons to enable them to recover debts and receive interest or dividends; but such certificate concludes only the debtors of the estate, and the procedure given by the Act was not intended to apply to the decision of any right to succeed to the estate of a deceased person.

1864. *August* 12. *C. P. No.* 73 *of* 1863.

THE petitioner prayed that the certificate granted under Act XXVII of 1860(b) by T. Chase, Acting Civil Judge of Rajahmundry, to the widow of one Rau Rámaráyyangár, of heirship to her deceased husband, might be suspended and cancelled, and that another certificate might be issued to the petitioner as guardian of the adoptive son of the deceased. Rau Ramaráyyangár died in 1855. In 1862 his widow applied to the Collector to have her deceased husband's estate registered in her name. The Collector directed her to produce a certificate of heirship under the Act. For eight years before the granting of the certificate to the widow, she had possessed and managed the deceased's estate. But in her petition for the certificate there was not even a suggestion that there were outstanding debts. The Acting Civil Judge, however, granted the certificate to her.

The Advocate General, for the petitioner.

Ritchie, for the counter-petitioner, the widow.

PER CURIAM:—The proceedings of each of the parties in this case have evidently been taken with the sole object of obtaining a decision in his own favour, which would, as it was thought give him the right to the enjoyment of the property as heir. Eight years had elapsed from the death of Rau Rámaráyyangár, and during the whole of that time the widow has been in possession of the estate. Her application for a certificate is based upon an order of the Collector. There is no suggestion even that there are any outstanding debts.

(a) Present Scotland, C. J. and Holloway, J.

(b) 'An Act for facilitating the collection of debts on succession, and for the security of parties paying debts to representatives of deceased persons.'

1864. August 12. C. P. No. 73 of 1863.

The jurisdiction given by Act XXVII of 1860 is of a peculiar character created to meet special circumstances, and unless those special circumstances are shown to exist the Civil Court is not competent to exercise that jurisdiction. Certificates can only be granted under this Act to persons claiming to be the representatives of deceased persons to enable them to recover the debts due to the estate of such deceased persons, and by express terms, under sections 8, 9 and 21 to receive interest or dividends upon Government securities or shares in a Bank or public Company : section 4 distinctly shows that the certificate is conclusive of the representative title *only against the debtors* of the estate. The procedure given by the Act was not intended to apply to the decision of any claim of right to succeed to the estate of a deceased person or any part of it. Such claims must be determined by a regular suit in the ordinary way.

We are therefore of opinion that the present case did not fall within the Act and that the certificate granted by the Civil Judge must be set aside. Of course as the Act does not apply, we are unable to comply with the other part of the petitioner's prayer by granting a certificate to him as the adopted son.

It was accordingly ordered that the order of the Civil Court of Rajahmundry, dated 22nd December 1863 should be cancelled.

Order cancelled.

Appellate Jurisdiction. (a)

Regular Appeal No. 64 *of* 1863.

SRI UPPU LAKSHMI BHAYAMMA GA'RU...*Appellant.*

A. PURVIS.................................. .....*Respondent.*

The Civil Courts have jurisdiction to entertain suits brought to try questions of liability to the public revenue assessed upon land.

Where a suit is brought for alleged wrongful acts by an executive officer of Government, the circumstance that the acts complained of were done in enforcing payment of a revenue assessment sanctioned by Government does not, *per se*, preclude the jurisdiction of the Court to entertain the suit.

But acts done by Government through its executive officers not contrary to any existing right according to the laws administered by the Municipal Courts, although they may amount to grievances, would afford no cause of action cognizable by the Civil Courts.

1864. *March* 7. *R. A. No.* 64 *of* 1863.

THIS was a regular appeal against the decree of L. C. Innes, the Civil Judge of Rajahmundry, in Original Suit No. 2 of 1863.

Sloan, for the appellant, the plaintiff.

Dale, Government Pleader, for the respondent, the defendant.

The Court delivered the following

JUDGMENT:—This is an appeal against the decree of the Civil Court of Rajahmundry dismissing the suit on the preliminary ground that it concerned the land revenue and was therefore not of a nature cognizable by the Court. The appellant (the plaintiff) contends that the Civil Court had jurisdiction, and ought to have heard and decided the suit upon its merits.

The question then, of some importance, which this Court is called upon to determine, is the jurisdiction of the Civil Courts to entertain a suit brought to try a question of liability to the public revenue assessed upon land. Now the first matter for consideration is the nature of the present suit, and to ascertain this, we must look to the statements in the plaint. It states, in effect, that the plaintiff is the owner on enam tenure and occupier of certain mamul wet lands fit in the rainy season for cultivation of paddy, but not suited for the cultivation of any crop in the hot season.

(a) Present: Scotland, C. J.; and Phillips, J.

1864. March 7. R. A. No. 64 of 1863.

That the lands were since a long time fully irrigated with the water of an old canal supplied from a large branch of the Godavery. That for the purpose of irrigating the lands of several villages, the District Engineer erected a bund and dug canals, and thereby obstructed and prevented the flow of water into the old canal. And that since that time the plaintiff had used the water from one of the canals newly dug, instead of the supply from the old canal, for the purpose of irrigation according to the former mamul, and had thereby obtained only the same crop in the rainy season. The plaint then refers to proceedings of the Board of Revenue, dated the 25th October 1860, and, after alleging that by reason of the enjoyment of such former supply of water, as well as under the said revenue proceedings, the plaintiff was not liable to be assessed to a water-rate in respect of the said mamul wet lands, it complains that the defendant had illegally assessed the lands and compelled payment of several rates, and part of the rate (assessed at three Rupees per acre) for faṣlí 1270. The relief prayed is the recovery of this latter sum, and that the plaintiff may be declared not liable to be assessed, the plaintiff giving up all claim to the amounts paid in the previous faṣlís.

It is apparent, from this plaint, that the plaintiff seeks to establish that the lands in question are legally exempt from an additional assessment to the water-rate ; and that the two alleged grounds for such exemption are, first, a right by long enjoyment of the free supply of the same quantity of water from the old canal as was obtained from the new canal, and, secondly, that the lands were of the description expressly excepted from assessment by the rules promulgated by the Board of Revenue, for the levying of the water-rate. The suit, then, is clearly a suit of a civil nature, brought for alleged wrongful acts by an executive officer of Government, and, in the absence of any express legal enactment or provision, we think the circumstance that the acts complained of were done in enforcing payment of a revenue assessment sanctioned by Government, did not, *per se*, preclude the jurisdiction of the Court to entertain the suit. There no doubt may be, as observed in the judgment of the Court below, acts done by the Government through its executive officers, which, though not contrary

1864. March 7. R. A. No. 64 of 1863.

to any existing law, may be regarded as grievances; and, undoubtedly acts that could not be considered as contrary to any existing right, acquired under the laws administered by the Municipal Courts, would afford no cause of suit, and a plaint, in which such an act appeared to be the only subject-matter of complaint would properly be rejected *in limine*. It would not, for instance, as regards the land revenue, be within the jurisdiction of the Courts to entertain a suit in which the alleged cause of action was the impolicy or inexpediency or oppressive nature of a revenue assessment, or its unjust inequality or unfair increase, and, under existing circumstances, it would be very undesirable and unfit that the Courts should possess such jurisdiction, as is observed in the Government Circular to which we were referred in *first volume of Circular Orders of the Board of Revenue* 116, *note* 2. An individual, whose property was liable to assessment, would on those grounds have to seek relief from the Government with whom no doubt rests the discretionary power to regulate and deal with the assessment to the revenue on all lands liable to be assessed when not permanently fixed.

But, in the present case, the plaintiff sets up that she possesses a legal proprietary right in the land, entitling her to the supply of water free of the assessment—a claim of legal exemption—and seeks to recover in respect of an act done in violation of such legal right, as also of the revenue rules in force and, until altered, binding upon the defendant; and we think the question, in this as in other suits of a civil nature, is, whether the cognizance of the suit was barred by any Act or Regulation in force when the suit was brought?

Upon this question we agree with the Civil Judge in the opinion, that the Court was not barred by the express provisions of any law from entertaining the suit. Regulation IV of 1831, mentioned in the defendant's written statement, clearly does not apply here, and having considered the other regulations referred to in the course of the argument, (Regulations II, XXVII and XXXI of 1802; and Regulations I and II of 1803), we think there is nothing in them to exclude the jurisdiction of the Civil Courts to determine the legal rights and liabilities of individuals in suits relating to

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or affecting the revenue assessment. There is no provision to be found like that in the Charter of the late Supreme Court, excluding jurisdiction in any matter concerning the revenue (a provision now done away with by the Charter of the High Court.) On the contrary, the Regulations provide for the transfer of the former judicial authority of the Revenue Board and Collectors to the Civil Courts, and cognize and provide for the exercise of such authority by the Courts in proceedings connected with the revenue assessment. This is more especially shown by Regulation XXVII of 1802, which secures to individuals the right to sue for acts done under the summary powers thereby given for enforcing payment of reveuue arrears.

Two decisions of the Bengal Sadr Court were cited by the Government Pleader; one reported at page 155 of first Sadr Díwání Adálat Decisions, and the other at page 242 of the second volume of the same reports: but they are very clearly distinguishable from the present case. Both decisions rest upon the express provision of a *Bengal* Regulation, securing exclusive discretionary authority to the Governor-General in Council. But, further, the suits in those cases were not brought to try a question of legal right to exemption; but to obtain, in the one case, an abatement of the assessment, on the ground that it was unfairly disproportioned to the land; and, in the other case, a re-adjustment of the decennial assessment, alleged to have become excessive and unjust after the separation of certain lands from the zamíndárí of the plaintiff.

For these reasons we are of opinion that the Court below had jurisdiction to entertain the present suit, and our judgment, therefore, is that the suit must be remanded, in order that it may be fully heard and determined in the usual course. We are not to be supposed as giving the slightest intimation favorable to the plaintiff's claim; the whole of which is denied by the defendant's written statement.

The suit will accordingly be remanded to the lower Court for trial on the merits.

Suit remanded.

Appellate Jurisdiction. (a)

Special Appeal No. 288 *of* 1863.

RASSONADA RA'YAR......................*Appellant.*

SI'THARA'MA PILLAI......................*Respondent.*

Where a plaintiff brings a suit for a declaration of his title as owner he is bound to establish his title affirmatively. He is in the same position as any other plaintiff and must make out his case, and the *onus probandi* that he is in possession as owner is upon him.

1864. *April* 11. *S. A. No.* 288 *of* 1863.

THIS was a special appeal from the decision of A. P. Srínívásá, the Officiating Principal Sadr Amín of Tinnevelly, in Appeal Suits Nos. 273 and 274 of 1862, reversing the decree of the District Munsif of Brahmadesam, in Original Suit No. 1461 of 1861.

Norton, for the appellant, the defendant.

Rájágópálachárlu, for the respondent, the plaintiff.

The Court delivered the following

JUDGMENT :—This suit was brought for a declaration, as against the defendant, that certain land and trees possessed by plaintiff were possessed by him as proprietor.

The defendant denied the proprietary right asserted, and alleged the plaintiff to be a mere parakudi. The defendant further alleged that the land, which was part of a village, had been granted by the Government to defendant's ancestors, and that the high ground on which the trees in dispute stand had been purchased from the Bráhmins of Manarkoil.

The Munsif considered that the plaintiff had failed to make out his proprietary right and decreed that he has a right of occupancy as a ryot.

The Principal Sadr Amín, declaring Document No. I not proved, and II to VII, *res inter alios actæ*, decreed for plaintiff because he had been admittedly long in possession.

At the first hearing of the case we passed the following order :—

"We are constrained to observe that the decree of the Lower Appellate Court is most unsatisfactory, and exhibits

(a) Present: Scotland, C. J; and Holloway, J.

1864 April 11. S. A. No. 288 of 1863.

strikingly the extreme danger which may attend these declaratory decrees. Their nature the Principal Sadr Amín has altogether misconceived. Where plaintiff, as in this case, seeks to be declared the proprietor of land, it is obvious that he must make out that title affirmatively. He is not satisfied with possession, a sufficient shield against all who are unable to establish a better title, but he wishes the Court to declare that he is in possession as absolute owner.

"It is obvious that to entitle him to such a declaration, he is bound to show that he is in possession as owner, and that to treat the possession with which he is not satisfied as entitling him, in the absence of rebutting evidence to such a declaration, is wholly to misconceive the nature of the case. It would be correct if he appeared as defendant, to treat that possession as evidence of ownership, but the case is manifestly altered where he chooses to set the Court in motion and seeks a declaration of his title as owner. He is in the same position as any other plaintiff, and must make out his case. Mere length of possession is equally consistent with the status of parakudi and that of proprietor. It is quite clear therefore that in this case the *onus probandi* has been cast by the Principal Sadr Amín upon the wrong person.

"In reversing a decree it is the duty of the Appellate Court to state, with the utmost distinctness, the grounds upon which it differs from the Court below, and more particularly where it altogether rejects evidence, which the lower Court has received, the principle of rejection should be clearly stated. The Principal Sadr Amín merely remarks that the documents rejected are *res inter alios actæ*. If we have been correctly informed at the bar, the plaintiff was himself a party to the investigation in which the Order No. III was passed. If so it was clearly admissible, although probably not conclusive. With respect to IV and V, although they would not have been admissible as evidence in this cause, both because the witnesses are alive, and the suit in which they were delivered was one with different parties; yet they were manifestly admissible to contradict the statements made by the first and seventh witnesses in this trial. Moreover, if the statement of the Munsif is correct, that all the villagers, of whom first and seventh witnesses are two,

are equally interested in this piece of land, and if the right of the plaintiff, if established, would be a right common only to himself and the rest of the villagers, upon the obvious principles of the law of evidence, they would be admissible both as against themselves and those jointly entitled. No one of these questions has received due consideration from the Principal Sadr Amín, and we cannot but feel that the entire misconception of the burden of proof, and the failure to consider what was at all events admissible for some purposes, were calculated to produce substantial miscarriage upon the merits.

"We therefore require the Principal Sadr Amín to determine:

" "Whether the plaintiff has made out affirmatively that he is the proprietor of this land;" and we hope that his decision will, concisely and satisfactorily, discuss the nature of the evidence upon which his conclusion is based."

In his return to this issue, the Principal Sadr Amín finds that the plaintiff has not made out affirmatively the title of which he seeks a declaration.

We consequently reverse the decree of the Lower Appellate Court and dismiss the original suit with all costs.

Appeal allowed.

Appellate Jurisdiction. (a)

Regular Appeal No. 19 *of* 1862.

ZAMI'ND'AR STRI'MATU GAUREVALLABA RA'MACHANDRA VELLIA BOMAYA NA'YIK. } *Appellant.*

VI'RAPPA CHETTI and others.......................*Respondents.*

Where a suit was brought upon two native bonds executed by the defendant for the principal and interest reserved, and the bonds contained a statement that the principal had been borrowed and received in cash :—*Held* that it was open to the defendant to show, by evidence, that only a portion of the principal sum had been received by him.

The strict technical doctrine of English law as to estoppels in the case of deeds under seal does not apply to the written instruments ordinarily in use amongst the natives of India.

Special Appeals No. 96 *of* 1860 *and No.* 223 *of* 1860, overruled.

1864. *May* 18. *R. A. No.* 19 *of* 1862.

THIS was a regular appeal from the decree of R. R. Cotton, the Civil Judge of Madura, in Original Suit No. 6 of 1862.

Mayne, for the appellant, the defendant.

The Advocate General, for the respondents, the plaintiffs.

The Court delivered the following

JUDGMENT :—In this case the defendant has appealed against the decree of the Civil Judge adjudging him to pay to the plaintiffs the sum of Rupees 35,674-9-4, being the amount of principal and interest sued for and claimed to be due on two native bonds of defendant for and on account of money lent and advanced. The execution of both the bonds was admitted by the defendant, but, in his written statement, he set up, in answer to the claim, that, only a portion of the principal sum stated in the bonds had been advanced and received, and that he had offered to repay the plaintiffs all that was due in respect of the sums actually advanced.

No point or issue was framed between the parties, and judgment was given upon a consideration only, as evidence, of the statements contained in the bonds, to the effect, in the one, that the principal sum had been borrowed, and, in the other, that it had been borrowed and received in cash. These statements the Civil Judge appears from his judgment to have considered as conclusive admissions, which, in the

(a) Present : Scotland, C. J.; and Frere, J.

absence of any allegation of fraud, amounted to an estoppel upon the defendant, and consequently that he could not be heard to deny that the whole of the principal sums had been received by him.

The appellant now objects that the Civil Judge was wrong in so deciding, and that it is open to him to show by evidence that only a portion of the consideration money had been in truth received; and we are of opinion that the objection is well founded and must prevail. At the same time it should be observed that the Civil Judge's decision is in direct accordance with the rule stated in the judgments of the late Sadr Court reported in the Sadr Decisions of 1860, p. 235, and the Sadr Decisions of 1861, p. 14, to which, with several other reported decisions of the same Court, we were referred.

There is no doubt that the statements in the bonds, but more especially the statement in the second bond, are strong *primâ facie* evidence of the truth of the actual receipt of the money, and to be rebutted only by clear and satisfactory proof to the contrary, on the part of the defendant, on whom lies the onus of proof. But they cannot, on any sound principle of the law of evidence, be treated between these parties as conclusive admissions precluding the defendant from offering evidence to prove the truth of his defence as regards the sums actually received.

The strict technical doctrine of the English law as to estoppels in the case of solemn deeds under seal rests upon peculiar grounds that have no application to the present bonds, or the other written instruments ordinarily in use amongst natives; and cannot, we think it enough to say, be considered as in any way governing the question in this case.

We must decide the case in accordance with the established rules and principles of law applicable to written instruments generally, regarding the statements as admissions in writing by the defendant. Now as regards statements made by parties, no doubt there are cases in which, on grounds of public policy and good faith, a man may be estopped from contesting the truth of his admission, whether

1864 May 18. R. A. No. 19 of 1862.

oral or writing: as where it is intentionally made for the purpose of being acted upon as true, and another person, otherwise uninformed, believing it to be true does act upon it, and is thereby induced materially to alter his previous situation. In such a case the person deceived may rely upon the admission as concluding the party by whom it was made. But that rule of law does not apply in favor of the present plaintiffs, who are the immediate contracting parties, with means of knowledge independently of the statements, as to whether or not the advances were actually made and received: and there is no legal ground, we think, for the contention that the written admission in this case operated as an estoppel against the defendant.

The consideration for parol contracts and agreements, written as well as oral, is an essential matter of proof between the parties, and the statement in a written instrument, as in the present case, of the payment and receipt of the consideration money, is, as an admission, strong presumptive evidence which may warrant a conviction of the truth of such payment and receipt: but it is not absolutely conclusive; and the party making it may prove that it was untrue or mistakenly made. By this means the defendant in the present case does not deny or disprove the terms of the contract as stated in the bonds, but only the failure on the part of the plaintiffs to pay over the consideration money under it; and this he may do consistently with the long recognized rule that extrinsic evidence is not receivable to contradict or alter substantially the terms and legal effect of a written contract.

Allusion was made in the course of the argument to Hindú rules of proof; and passages in Sir W. Macnaghten's *Principles of Hindú Law*, p. 280, were referred to. But neither in those passages nor, that we are aware of, in any other work of authority, is there anything that can be considered as at all affecting the rules of law upon which our decision rests, and we should observe that in the appeal case from this country of *Chowdri Persád and another* v. *Chowdri Dowlát Sing*, 3 Moore's I. A. 347, in which the question was whether the consideration money for certain deeds of compromise had been paid, it was conceded and taken as the foundation of the judgment of the Privy Council that the admission in the deeds of the payment of

the money, though evidence of the payment, was not conclusive. 1864. May 18. R. A. No. 19 of 1862.

The result of our judgment is that the case must be sent back in order that the Civil Judge may proceed duly to raise the issue as to the payment of the consideration money, and to pass a decree after considering the evidence that may be offered.

The costs of this appeal will abide the event of the suit and be paid to the party in whose favor the decree shall be given.

Issue directed.

Appellate Jurisdiction.(a)

Regular Appeal No. 9 *of* 1864.

SAUSONE EZEKIEL JUDAH and another......*Appellants.*

ADDI' RA'JA' QUEEN BI'BI..................*Respondent.*

In construing Powers of Attorney the special purpose for which the power is given is first to be regarded, and the most general words following the declaration of that special purpose will be construed to be merely all such powers as are needed for its effectuation.

Where the owner of a ship, by Power of Attorney, constituted the master his agent and authorised him to raise or borrow upon the ship's papers such sums of money as he should deem necessary for the repair of the ship " and to act in the premises as fully and effectually to all intents and purposes as I might or could do if personally present," in a suit for the amount of a mortgage bond upon the ship executed by the master :—*Held* that the master had no authority to sell or mortgage the ship.

THIS was a regular appeal from the decree of A. W. Sullivan, the Civil Judge of Tellicherry, in Original Suit No. 1 of 1862. 1864. July 7. R. A. No. 9 of 186

The Advocate General and *Mayne,* for the appellants, the plaintiffs.

The Court delivered the following

JUDGMENT :—This suit was brought by the executors of a Calcutta firm to recover a sum of upwards of 60,000 Rupees, alleged to be due to them under the stipulations of a mortgage bond of a ship, executed at Calcutta in the English

(a) Present Phillips and Holloway, J. J.

1864. July 7. R. A. No. 9 of 1864.

form by the defendant's master of the ship, one Hydroos, appointed as agent by written instrument, also executed as a deed.

The defendant, joined as heir of the original owner of the ship, answered, that the master had exceeded his authority, that there was no power to sell the ship, and that the accounts were in many particulars most erroneous.

The Civil Judge rejected the plaint, because he considered that the execution of the mortgage bond sued upon was not within the scope of the agent's authority. He went on to comment upon sundry other acts of the plaintiff, in deposing the defendant's Master, putting in officers of his own, carrying on a voyage and charging the heavy loss upon it to the defendant, with interest at 30 per cent.

The Advocate General and Mr. Mayne, for the appellant, simply argued on the construction of the Power of Attorney, that the Master had authority to execute the mortgage bond sued upon. No cases were referred to, the learned counsel not apparently disputing the dictum of the Court that the authority of an agent, and especially of an agent appointed by writing, must be strictly confined to the powers distinctly conveyed to him. The English cases upon this point are not, indeed, very numerous, probably because, the rule being so well understood, the instances of deviation are, in the case of agents appointed by express authority, rare.

Howard v. *Baillie*[(a)] and *Gardener* v. *Baillie*[(b)] were two cases upon the same Power of Attorney. The decisions were different, but the principle of law admitted. The Court of Common Pleas went upon special circumstances. These were strong cases because it appears that there was a probability of ample assets of the deceased testator, and, as argued by Eyre, C. J., she really obtained further time by the transaction. Moreover, it is an inflexible rule in the construction of Powers of Attorney, that the special purpose for which the Power of Attorney was given, is first to be regarded ; and the most general words, following the declaration of that special purpose, will be construed to be merely all such powers as are needed for its effectuation. *Esdivile* v. *La Nauze*[(c)], is a very strong example of this rule.

(*a*) 2 H. Bl., 618. (*b*) 4 Term Rep. 591.
(*c*) 2 Young and Col. Ex. 394.

The largest powers were given to deal with the principal's estates in Ireland to bring actions "for the recovery of rents, or any other debt, duty, matter or thing, due or coming to his principal for or in respect *of the premises or in any other respect whatever.*" These words, in themselves very wide, are followed by "and in my name to give and further to do all lawful acts and things whatsoever concerning all my business and affairs of what nature or kind soever in the said United Kingdom, and generally to act for me and on my behalf *in all matters* as fully and amply in all respects, as I might or could do therein, were I personally present and had done the same." The question was, whether the Power of Attorney gave power to endorse bills, and Baron Alderson decided that it clearly did not. "The general words are not sufficient, for they must be construed with reference to the antecedent matter, which states the purpose for which the letter of Attorney was given." The same rule was laid down in another very strong case, *Attwood* v. *Munnings*[(a)]: Holroyd, J., says:—"These instruments do not give general powers, speaking at large, but only where they are necessary to carry the purposes of the special powers into effect." As to the principle of interpretation applicable to Powers of Attorney there can be no doubt, and this is certainly not the country in which they can safely be relaxed.

It only remains to apply them to the Power of Attorney in this case, and to see whether the document on which this suit is brought is authorized by the terms of that power. "I do by these presents nominate, constitute and appoint, and by these presents do constitute and appoint the said Hydroos Hají to be my true and lawful Attorney for me in my name and for my use to raise or borrow money upon the document or documents of the aforesaid ship." The authority given is not to mortgage the ship, but to pledge the title deeds. If the documents evidenced the title to land, the Power of Attorney would be a power to raise money by equitable mortgage, but certainly would be no authority to execute a legal mortgage. Applied to a ship, and regard being had to the law merchant, it is manifestly

(a) 7 Bar, and C. 272.

1864. July 7. R. A. No. 9 of 1864.

an authority to hypothecate the ship for the amount of the advance. The words which follow—"and to do all and such acts and deeds, and to make and execute *such documents* good and effectual security or securities to the person or persons so lending the money upon the mortgage of the aforesaid documents as my said Attorney shall deem necessary or expedient, giving and by these presents granting to my said Attorney my full power and authority to do and act *in the premises as fully and effectually to all intents and purposes* as *I might* or could do if personally present, ratifying and confirming all that the aforesaid Hydroos Hadjí shall lawfully do or cause to be done in the premises by virtue of these presents"—it was argued, give full authority to execute any deeds whatever required by the lender as a condition for lending the money. It is quite obvious to us that the meaning is simply that the Attorney shall have power to execute all deeds necessary to making the hypothecation effectual. It refers not to the pecuniary adequacy of the security, but to its being rendered a valid security of the kind which the agent was authorized to give. Independently of the general rules of construction which would narrow the general words, as in the case of the much stronger and more general words in the cases quoted above, the authority is only given to execute such deeds in the premises. It was contended that this meant, all things necessary to give such security as would induce the lender to advance the money. We are quite satisfied that this is not the true construction, but that the power given is to execute all documents necessary to create a valid hypothecation. The agent so appointed proceeded to execute the deed in the English form. The first covenant is for the principal, her heirs and successors, to pay Rupees 30,000 with 30 per cent. interest payable by monthly instalments. There is then a covenant to keep the ship insured for Rupees 40,000, and then, for further assurance, a mortgage of the ship with a power of sale; that power of sale was afterwards exercised. Now, the mere recital of these provisions renders it quite manifest that they are wholly unauthorized by the power, and, as if to show that the plaintiffs were quite aware of this, they got a document of the same kind from the agent.

1864. July 7. R. A. No. 9 of 1864.

It was said at the bar that the Master had authority, in case of necessity, both to pledge the personal credit of his owner and to hypothecate the ship, and that a large construction ought to be given to this document because it was obviously intended not to narrow but to extend the agent's authority. The answer to this is that, express authority having been given, all question of implied authority ceases, and that, construing it simply as a power to hypothecate, it is an extension of the natural authority of the agent, inasmuch as it relieves him and the lender from the necessity of communicating with the principal, from all questions as to whether the distance and the urgency exonerated him from so communicating (*Wallace* v. *Fielden* [a] the *Hamburgh*[b]), the *Bonaparte*[c]. Nor is the form of the contract unimportant. Its effect would probably be to shut out all defences but actual fraud. In *Stainbank* v. *Fennin g*, it was of course conceded that mortgaging is never within the Master's implied authority, and in *Stainbank* v. *Shepard*[e] in the Exchequer Chamber the present Lord Wenslydale, then Park, B., says, (p. 441.) "But this power (that of the Master) does not extend to more than hypothecation—well known in the civil law and distinguished from a mortgage, as well as a pledge or power at common law; the former of which transfers the property, the latter a lien on the chattel and is void without actual possession; but hypothecation gives only a right to be enforced against the subject of it through the medium of process." These words of the learned Baron sufficiently show the difference in the qualities of the act authorized and the act done. We cannot at present enter upon the question of the conscientiousness or otherwise of this claim. It is sufficient to say that the deed sued upon is not the defendant's deed, because her agent in executing it, not only did not follow, but widely deviated from, the authority given. The action brought upon this deed, of consequence, fails, and this appeal must be dismissed with costs.

Appeal dismissed.

(*a*) 8 Moo. P. C. 398. (*b*) 32 L. J., Adm. 116.
(*c*) 8 Moo. P. C. 459 explained in *Duranty* v. *Hunt*, 10, Jur. N. S. 60.
(*d*) 2 C. B. 51. (*e*) 13 C. B. 418.

Appellate Jurisdiction(a)

Regular Appeal No. 13 *of* 1864.

NALLAPA REDDI.....................*Appellant.*

BALAMMA'L and others.............*Respondents.*

A division of property took place in 1837 between A, the mother and guardian of the plaintiff, and B, the husband of two childless widows, the defendants. In a suit to recover possession of the property on the ground that the division did not bind the plaintiff:—*Held* that, there being no proof of fraud, or that undue advantage was taken of plaintiff's minority, and in the absence of proof of gross inequality in the distribution of the property, the division was valid and binding upon the plaintiff.

1864. *July* 16. *R. A. No.* 13. *of* 1864.

THIS was a regular appeal from the decree of J. W. Cherry, the Civil Judge of Salem, in Original Suit No. 2 of 1863.

Mayne and *Raingácháriyár*, for the appellant, the plaintiff.

Rámanuja Aiyangár, for the first, *The Advocate General* for the second, and *Branson*, for the second and third respondents, the first, second and third defendants.

The Court delivered the following

JUDGMENT:—This was a suit for the recovery of the four muttahs or small estates, of Billur, Chélur, Muttán Chetti, and Sattivady, in the taluks of Parmatty and Namkal. The first and second defendants are childless widows of Venkata Ráma Reddi, the son of Peddi Reddi, who was the brother of plaintiff's father, also named Venkata Ráma Reddi. The plaintiff asserted that his father and Peddi Reddi were undivided brothers, and that the former died in the year 1835, leaving the plaintiff, a minor of three years old, with two brothers fourteen and six years of age respectively, both of whom have since died. Plaintiff attained his majority in 1852, and affirms that under Hindú law he is consequently now entitled to the four muttahs abovementioned, which form the greater part of the family estate, as against the childless widows of his uncle, Peddi Reddi. He produced, in support of his claim, a document marked A in the present case, and purporting

(a) Present: Phillips and Frere, J. J.

1864. July 16. R. A. No 18 of 1864.

to be an agreement executed by the said Venkáta Ráma Reddi, husband of the first and second defendants, in 1857, or shortly before his death, by which he consented to a division of the entire property in equal shares between himself and Rámasvámi Reddi, the elder brother of the plaintiff.

The Civil Judge was of opinion that, by the second defendant's document, No. IX, and by other evidence, it was fully proved that the two families, consisting of the plaintiff and his minor brothers, on the one hand, as represented by their mother and guardian, Muttiyal Ammál, and Peddi Reddi ón the other, divided the family estate in July 1837, and had continued since in a state of division. He also discredited the Document A produced by the plaintiff, for reasons which are fully stated in his judgment. The Civil Judge accordingly dismissed the claim of plaintiff, with costs, on the ground that the first and second defendants, as widows of a divided member of the family, were entitled to take precedence of other heirs.

The learned counsel for the plaintiff, at the hearing of this case, admitted the fact of division, and that the two families entered into possession of their respective shares under it so far back as the year 1837, but urged that this division cannot be held valid as against the plaintiff, who was a minor at that time. But there was nothing essentially illegal in such a division, and it is manifest that if a partition were to be declared invalid simply on the ground that one or more of the parties interested were minors at the time, it would be difficult to make an effectual division at any time in any Hindú family consisting of several members. In this case the plaintiff and his brothers appear to have been represented in good faith by their mother and natural guardian, and there is nothing to indicate fraud, or that any undue advantage was taken of the plaintiff's minority, or of the sex of their mother. It has indeed been urged at the hearing that the division was unequal, and consequently cannot be upheld. It is true that Peddi Reddi and his branch appear to have obtained under this division the four muttahs now in dispute, while the plaintiff's branch only obtained that of Kelambur, of which he admits that he is still in possession: but there is no evidence of the relative value of these five muttahs; and it is further to be noted

1864. July 16. R. A. No. 18 of 1864.

that, by this deed of division, it is expressly stipulated that Peddi Reddi's branch were to be charged with all the liabilities of the elder Venkáta Ráma Reddi, the father of the plaintiff and former representative of the entire family. These debts appear to have been heavy, for the estates were under attachment at the time. We are therefore of opinion that no such gross inequality has been shown, as would justify us in setting aside the division of 1837 on this ground.

As respects the Agreement A, we have also no hesitation in expressing our concurrence in the view taken by the Civil Judge, and we consider this deed to be, to say the least, of a most suspicious character. It is in the highest degree improbable that the deceased Venkáta Ráma Reddi, whose wife is shown to have been at the time eight months advanced in pregnancy, would have executed such an agreement, without any apparent motive, to the prejudice of his expected issue; and it is also to be observed that no other members of the family, nor any of the village authorities, are shown to have been present at the time, nor was any communication made to the Collector respecting its contents.

In conclusion, therefore, we resolve to affirm the decree of the Civil Judge, and to dismiss this appeal with all costs.

Appeal dismissed.

Appellate Jurisdiction.(a)

Referred Case No. 11 *of* 1864.

AMMA'LLU AMMA'L *against* SUBBU VADIYA'R.

Where the cause of suit as stated by the plaintiff appears to be within the cognizance of a Court of Small Causes, the mere denial by the defendant of the plaintiff's right or title is not sufficient to oust the jurisdiction of the Court. If it reasonably appears to the Judge that a *bonâ fide* question of right which is not within his jurisdiction to decide is fairly raised in the suit his jurisdiction ceases.

1864. October 24. R. C. No. 11 of 1864.

THIS was a case referred for the opinion of the High Court by F. M. Kindersley, the Acting Judge of the Court of Small Causes at Tanjore, under Act XLII of 1860, Sec. 13.

No counsel were instructed.

(a) Present: Scotland, C. J.; and Phillips, J.

The case stated was that the defendant executed to plaintiff on the 28th April 1861, a samibogum (lease) bond of which the translation is as follows:— 1864. October 24. R. C. No. 11 of 1864.

"Deed of maintenance executed on 28th April 1861 to Ammállu Ammál widow of Rámanátha Vadiyár living in Yichangudy village, by Subbu Vadiyár, son of the said Rámanátha Vadiyár. Of the ¼ pangu of land which I possess out of the sixteen karés (shares), the said village consists of, I have mortgaged to-day 1-16th pangu to Lakshamanaiyan of Perá-úr. Of the remaining 3-16th pangu, 1-16th pangu is set apart for your maintenance. This 1-16th pangu I take into my own enjoyment and agree to pay you, as samibogum thereon each year, half of the Kadappu paddy and half of the Sambapisánam paddy, which according to the custom of the village is found due to it, and I will take receipts from you in acknowledgment of the receipts of the quantity of paddy measured as above stated. You should receive samibogum as above for life and continue to live in the room near the verandah in the house and should not mortgage or otherwise alienate the said land. Thus I, Subbu Vadiyár, have executed to Ammállu Ammál this deed of maintenance.

(Signed) Subbu Vadiyár (son of Rámanátha Vadiyár) writer of the bond.

Attested by Naranaiyan, son of Vathinátharyan Vembuaiyan, son of Rámaiyan, Lackshamaniyan of Perá-úr, Subramaniya Aiyan, son of Venkáta, son of Subbaiyan."

Under this deed plaintiff sued for Rupees 139-1-9, being the value of samibogum paddy due for 1861, 1862 and 1863. The defendant denied the execution of the bond, and pleaded that the plaintiff had no right to maintenance. The Acting Judge dismissed the claim under paragraph 4 of the Rules of Practice issued for the Courts of Small Causes, in which it is stated that the Courts "have no jurisdiction in suits to establish a right to maintenance, but if this right has been judicially decided, and the only question is whether arrears claimed are due or not, they may adjudicate in such a case." The right to maintenance having been denied by the defendant and not having been judicially awarded, the

1864. October 24. R. C. No. 11 of 1864.

Acting Judge dismissed the suit as not being cognizable in his Court, subject to the opinion of the High Court.

The question for the decision of the High Court was whether the suit should be dismissed under the circumstances stated, or whether it should be investigated, taking evidence on the document sued on notwithstanding the defendant's plea that plaintiff had no right to maintenance?

The Court delivered the following

JUDGMENT:—The plaintiff in this suit seeks to enforce a demand for money alleged to be due by way of rent under the express terms of a written contract entered into by the defendant, and we are of opinion that the Court of Small Causes had jurisdiction to entertain the case. The suit cannot be considered as brought to establish the right of the plaintiff to maintenance, and if the samibogum bond be a genuine and valid instrument in all respects, the denial of the plaintiff's right or title to maintenance seems to be unfounded, and merely colorably put forward. Where the cause of suit, as stated by the plaintiff, appears to be within the cognizance of the Court, the mere denial of the plaintiff's right or title on the part of a defendant is not sufficient to oust the jurisdiction of the Court to hear the case. It is for the Judge to consider whether a *bonâ fide* question of right, which it is not within the jurisdiction of Small Cause Courts to decide, is fairly raised in the suit; and when that reasonably appears, and not before, his jurisdiction in the matter ceases. For these reasons our answer to the question submitted is, that the suit ought not to be dismissed simply because of the defendant's denial of the plaintiff's right to maintenance; but that the Judge should hear the case, and dismiss the suit for want of jurisdiction, or decide upon the claim, according as he shall be of opinion, either that the right to maintenance *bonâ fide* comes in question in the suit or that the denial by the plaintiff is only colorably set up.

Appellate Jurisdiction.(a)

Regular Appeal No. 12 *of* 1864.

KANDAN CHETTI and another............*Appellants.*

COORJEE SEIT and others................*Respondents.*

A contract to pay money in consideration of foregoing a criminal prosecution is opposed to public policy and will not be enforced. The consideration to support the promise in such a contract is a vicious consideration.

Keir v. *Leeman* observed upon.

THIS was a regular appeal from the decree of S. N. Ward, the Civil Judge of Coimbatore, dated 13th October, 1863, in Original Suit No. 1 of 1859. 1864. *October* 26. *R. A. No.* 12 *of* 1864.

The plaintiffs sued for recovery of Rupees 4,158-2-8 the principal and interest on certain dealings in hundís which the plaintiffs carried on with the second defendant, who, with the other defendants, was an undivided member of a Hindú family. The plaintiffs also relied upon a promise by the first defendant to pay the amount due by his son, the second defendant. The case for the plaintiffs was that they commenced to trade with the second defendant towards the end of the year 1858 in hundís and ready money, and the balance in their favor was found to be Rupees 4,050-10-5. For this balance second defendant drew eight hundís in favor of the plaintiffs upon Sowcars in Madras and Tinnevelly, who refused to accept them on the ground that they had no funds belonging to the second defendant in their possession. The second defendant soon afterwards absconded. The first, third, fourth and fifth defendants, in their answers, relied upon a division on the 1st of July 1851, since which time the defendants have been divided from the second defendant, and the first defendant denied the promise to pay alleged by the plaintiffs. All the defendants denied their liability to pay the debt contracted by the second defendant. The second defendant did not put in an answer. Among the exhibits filed in support of plaintiffs' case, were a letter written by the Joint Magistrate of Coimbatore to the Joint Magistrate of Benares, dated 29th January 1858, stating that

(a) Present Frere and Holloway, J J.

1864. October 26. R. A. No. 12 of 1864.

the first defendant had consented to pay a sum of Rupees 1,789 claimed by two creditors of the second defendant, at a time when the second defendant was charged before the Joint Magistrate of Benares with fraud and escaping from custody, and other letters showing that the amount had been paid by the first defendant. Four issues were settled by the Civil Judge.

Upon the first issue, the Civil Judge found that the debt was contracted by the second defendant and that the amount, with interest, was due by him to the plaintiffs. The other issues were found in favor of the other defendants. Judgment was accordingly given in favor of the plaintiffs against the second defendant, with costs, and in favour of all the other defendants, whose costs the plaintiffs were adjudged to pay. The plaintiffs now appealed.

Mayne, for the appellants. Our case is this, we dealt with the second defendant in hundís, and he gave us hundís which were dishonored. The second defendant having absconded, we applied to the first defendant to pay the debt, and he agreed to make himself responsible for it. The agreement was, in effect, that if we did not let justice take its course against the son, the second defendant, who had defrauded us, the first defendant undertook to be answerable for the debt.

[HOLLOWAY, J. :—Was not that something like an agreement to compromise a felony, and could it be enforced ?]

Cheating was a misdemeanour and there was nothing to prevent a person from compromising it. There might have been no offence established.

[HOLLOWAY, J. :—If there was no offence, there was no consideration at all.]

The charge might not have succeeded. The plaintiffs having power to bring the second defendant before a Magistrate upon a charge of swindling or cheating, the first defendant says, "Don't do so, and I will pay the amount due by my son."

[HOLLOWAY, J. :—Can it be contended that swindling is not an offence against the public ?]

Undoubtedly swindling was no more an offence against the public than an assault.

[HOLLOWAY, J. :—The second defendant got you to deliver money to him pretending that he gave you good bills, whereas he gave you bills which were of no value.]

The bills were given upon a balance of money found due upon an account of the transactions between the parties. The balance was struck and was found to amount to Rupees 4,000 for which he gave us hundís which were dishonored, and when we tried to get hold of him it was found that he had run away.

[HOLLOWAY, J.—Either the consideration was nothing or there was some consideration. If there was a consideration to support the promise what was it? It was forbearance of a prosecution for a crime. What prosecution could you have instituted ?]

It is not necessary to shew that we could have established the offence charged. The parties are all merchants. One says to the other :—" Don't subject us to the disgrace of a criminal prosecution which will injuriously affect our reputation, and we promise to pay what is due to you."

[HOLLOWAY, J. :—Then the consideration on which you declare is forbearance of a prosecution. He referred to *Collins* v. *Blantern*(a) *Osbaldiston* v. *Simpson*(b)].

The consideration was to forbear disclosure before a magistrate, with the attendant disgrace of such a disclosure.

[HOLLOWAY, J. :—The consideration here was the forbearing to prosecute an offence which was swindling or cheating, or perhaps it might be theft. In *Collins* v. *Blantern*(c) the offence compromised was perjury, which was not then, and is not now, a felony in England. The ground of refusing to uphold the contract in that case was the mischief to the commonwealth which would result from allowing the compromise of such an offence to constitute a sufficient consideration. The Indian Penal Code makes no distinction between felonies and misdemeanours.]

(a) 1 Smith Lead. C. p. 155, 2nd. Ed.
(b) 13 Sim. 513. (c) Supra.

1864. October 26. R. A. No. 12 of 1864.

Mayne commented upon *Collins* v. *Blantern*, and *Osbaldiston* v. *Simpson* which he contended were distinguishable from the present case.

[HOLLOWAY, J.:—Referred to Sections 213[(a)] and 244 of the Indiau Penal Code.]

The forbearing to expose the misdeeds of the second defendant, and thereby blasting the commercial credit of the family, was sufficient. The first defendant says:—" In consideration that you will not reveal that a member of my family is not fit to be trusted in matters affecting our commercial honour, I agree to pay you the debt due to you by that member of my family." Such a consideration was perfectly good.

The Court, having taken time to consider, delivered the following.

JUDGMENT:—This was a suit against the family of second defendant for money advanced upon some bills which had been dishonoured. The action was brought against the members of the debtor's family on the ground that the family was undivided, and also upon the ground that there was an express promise to pay.

All the members of the family alleged division, and denied the alleged promise.

The Civil Judge, finding all the facts in favor of the defendants, dismissed the suit with costs.

In appeal, it was conceded that it was impossible to contend that the family was not divided and that the plaintiff himself did not know the transaction out of which this

(a) Section 213 is as follows:—" Whoever accepts or attempts " to obtain, or agrees to accept, any gratification for himself or any " other person, or any restitution of property to himself or to any " other person in consideration of his concealing an offence or of his " screening any person from legal punishment for any offence or of " his not proceeding against any person for the purpose of bringing " him to legal punishment, shall, if the offence is punishable with " death, be punished with imprisonment of either description for " a term which may extend to seven years, and shall also be liable " to fine; and if the offence is punishable with transportation for life " or with imprisonment which may extend to ten years, shall be " punished with imprisonment of either description for a term which " may extend to three years and shall also be liable to fine; and if " the offence is punishable with imprisonment not extending to ten " years, shall be punished with imprisonment of the description pro" vided for the offence for a term which may extend to one-fourth " part of the longest term of imprisonment provided for the offence " or with fine or with both."

action has arisen to be the separate transaction of a member of a divided family. It was, however, contended that an express promise of the second defendant was proved by the evidence of the fourth, fifth, and ninth witnesses. No consideration whatever for this promise was stated in the plaint, and, following upon the allegation of joint liability, there is little doubt that the pleader merely intended to strengthen the allegation of liability by the usual assertion, that the defendant had promised to meet it. On the reading of the statements of these witnesses we found that they amount to this, that after the bills had been dishonored, the plaintiff went to the father of his debtor and said, "Your son has cheated me, and I intend to prosecute him before the Magistrate;" and that the defendants answered in effect, "Do not bring this disgrace upon us, and we will pay the money." At this point it seemed clear that the consideration for the promise was the foregoing of a criminal prosecution, and we referred to *Collins* v. *Blantern* and *Osbaldiston* v. *Simpson.*(a)

1864. *October* 26. *R. A. No.* 12 *of* 1864.

The learned Counsel then sought to show that the consideration was the fear of disgrace, a perfectly legitimate and good consideration. It is, however, impossible not to see that the disgrace was not the fear of the son's conduct being divulged, but the fear of disgrace accruing through a crimnal prosecution, and that the promise is alleged by the witnesses to have been made on condition of not entering upon that prosecution. Such a contract is not only clearly opposed to public policy, but the making of it is now criminally punishable.

We thought then that there was nothing in the point that no conviction could have followed, that it was sufficient that there was at least plausible ground for the prosecution, and that in consideration of the promise the plaintiff agreed to abandon it. All the previous cases are reviewed in *Keir* v. *Leeman.*(b) As usual, there are conflicting authorities, and Tindal, C. J., says in the Exchequer Chamber:—"Indeed it is very remarkable what very little authority there is to be found, rather consisting of dicta than decisions, for the principle that any compromise of a misdemeanour, or indeed of any public offence, can be otherwise than ille-

(a) 13 Sim., 513. (b) 6 Q. B. 308, E. C. in error 9 Q. B. 371.

1864. October 26. R. A. No. 12 of 1864.

gal. If the matter were *res integra* we should have no doubt on this point." And the learned Chief Justice evidently doubts whether, even in the case of an assault, the prosecutor is at liberty to agree not to indict, although he may agree not to pursue the assaulter civilly. Mr. Smith's note therefore does not embody the doctrine of *Keir* v. *Leeman*. That case settled that, although the prosecution for assault and riot was with the leave of the Judge of Assize withdrawn on condition of the promise to pay the sum sued for, the consideration was vicious and the action could not be maintained. It did not affirm, but rather threw doubt upon, the position which Mr. Smith states it to have established. The judgment of Coltman, J., in *Ward* v. *Lloyd*,(a) seems to us to embody the exact rule. "I do not consider it material to consider whether or not the defendant was actually guilty of embezzlement, for if there was reasonable ground to suspect that he was, although the circumstances might not be such as to insure a conviction and the warrant of Attorney was given to induce the plaintiff not to prosecute, the consideration would in my opinion be illegal."

Now this seems to be precisely the present case. There seems every good ground for supposing that the bills were a mere trick, and that the whole transaction was one of a series of frauds for which the father had before paid money. There seems to have been most plausible ground for a prosecution. We can entertain no doubt that the promise was made, if made at all, on condition of the plaintiff foregoing that prosecution, and, entertaining no doubt that the permission of such compromises is contrary to the policy of the law, and that the consideration for the promise is on the authorities as well as in sound reason wholly vicious, we dismiss this appeal with costs.

Appeal dismissed.

(a) 6 Man & Grang. 785, 189.

Appellate Jurisdiction.[a]

Regular Appeal No. 49 *of* 1863.

MESSRS. SHAND AND CO..............*Appellants.*

ATMAKURI ADINARAYANA CHETTI...*Respondent.*

The plaintiffs entered into a contract in writing, by which the defendant was to deliver 2,450 bundles of Gingely seed on being put in possession of the necessary funds. In a suit for damages by reason of non-delivery :—*Held* that the plaintiffs before they could recover must shew that they paid or tendered the amount stipulated, and that the vendor's rights under the contract cannot be controlled by the course of dealing between the parties.

THIS was a regular appeal from the decree of G. S. Forbes, the Agent at Ganjam, in Orginal Suit No. 16 of 1862. 1864. October 26. R. A. No. 49 of 1863.

The Advocate General, for the appellants, the plaintiffs.

Sloan, for the respondent, the defendant.

The Court delivered the following

JUDGMENT :—This was a suit to recover a sum of money, as damages for the non-shipment by defendant of 2,450 bundles of Gingely seed.

Defendant answered that he only contracted to ship the seed if supplied with funds, and that the ship was chartered and sent to the port of Pooree before the time agreed upon.

The Agent on both these grounds dismissed the suit with costs. In appeal, the Advocate General, for the plaintiffs, argued that the contract to deliver was unconditional, that the language of the defendant himself showed that he considered the contract to have been broken, and that the course of dealing between the parties shewed that the construction of the contract was that the goods should be shipped whether paid for or not.

Mr. Sloan, for the defendant, pointed out that a contract to ship as soon as a ship should be sent, was a contract to deliver within reasonable time, and for this he quoted *Toms* v. *Wilson.*[b] He also argued that the supply of

(*a*) Present : Frere and Holloway, J.J.

(*b*) 9 Jurist N. S. 492.

1864. October 26. R. A. No. 49 of 1863.

funds was a condition precedent to the obligation to supply the goods.

We threw out, during the argument, that such words as "immediately," "directly," did not generally mean within a reasonable time, as *Duncan* v. *Popham*(a), clearly shews. When *Toms* v. *Wilson* is examined, it will not be found to contain anything inconsistent with the earlier case. The words of the Chief Baron in the Exchequer Chamber(b) :— "For payment ought to have been made to Wilson or to his Attorney. It is clear that the seizure took place before any attempt could have been made to pay either Wilson or his Attorney," show clearly that the case is no authority for the position for which it was quoted. *Toms* v. *Wilson* is an authority that a reasonable construction must be put upon the word "immediately," but it leaves the case of *Duncan* v. *Popham* wholly untouched.

While we make these remarks to prevent misapprehension, it is quite clear, on the simplest principles of the law of contracts, that this action cannot be maintained.

The effect of the document D is a contract by the defendant to purchase goods for Shand and Co., re-sell them to that firm, and ship them. The effect, taken with the letters is, "I will ship the goods for you, but I expect a remittance to enable me to buy them ;" and the effect of the letters of the agent of the plaintiffs is, "You will have the remittance for which you ask," and of course the meaning must be in time to enable you to purchase and ship. It is plain that this contract must be less stringent than a sale of specified goods on 7th February. Such a contract, as is somewhat loosely said, would without delivery have passed the property in the goods to the plaintiffs. This dictum of course requires considerable qualification, considering the rights of the vendor in possession after such a sale. Those rights are admirably discussed by Mr. Justice Blackburn in his book on the effect of the contract of sale.

The rule of English law governing this case, after a rather loose paragraph which says that, although the property in the good is transferred, the vendee acquires only an inchoate title, is correctly stated by Chitty (P. 401). "Ac-

(a) 8 C. B., 225. (b) 32. L. J. Q. B. 382, 384.

cordingly he cannot sue the vendor for wrongfully depriving him of the possession of goods, or for their non-delivery, until the price be paid or tendered by him." Now it is admitted in this case that the vendee had neither paid nor tendered the price of the goods. The argument is, that by the course of dealing between them this was not necessary. The meaning of this rather vague phrase would appear to be that, because on former occasions the vendor had foregone his strictly legal rights, he is to be bound for ever to forego them, a position of which the mere statement is the only refutation necessary. As a subject of some historical interest, we may remark that the difference between the Roman law and the English law as to the requisites of a contract of sale was created by Justinian.(a) The old Roman law was nearly the same as the modern law of England, and some of the inconsistencies in the decisions of the English Courts have arisen from a misapprehension of this fact.

We do not consider it necessary to say any thing upon the ethical aspect of this action, a point much labored by the counsel for the defence. We could say nothing satisfactory to our own feelings or those of the plaintiffs. This appeal is dismissed with costs.

Appeal dismissed.

(a) Just. Inst. III, tit 23. Ortolan Just. Vol. III, 368.

Appellate Jurisdiction.(a)

Regular Appeal No. 9 *of* 1856.

MAYNA BAI' and others..................*Appellants.*

UTTARAM and others..........................*Respondents.*

An Englishman lived with a Brahmin woman living apart from her husband by whom he had two sons.

Held that the sons are Hindús, and their rights are determined by the rights of the class of Hindús to which they belong.

Held also, that they are to be regarded as Sudras, or as a class still lower, and that, in the absence of preferable heirs, they inherit the property of their mother and of one another.

1864. *November* 6. *R. A. No.* 9 *of* 1856.

THIS was a regular appeal from the decree of C. H. Woodgate, Civil Judge of Tinnevelly, in Original Suit No. 3 of 1852.

The Advocate General, for the appellants, the defendants.

Norton, Mayne, and *Rajagopalacharlu,* for the plaintiffs, the respondents.

The facts sufficiently appear from the following

JUDGMENT :—This is an application to the Court in pursuance of the leave reserved to the respondents in the cause of *Mayna Baí* v. *Uttaram,* by the decree of Her Majesty in Council, dated 30th November, 1861, reported at VIII M. Ind. Ap. 425.

The appellants in that cause are still the plaintiffs in ejectment, the first being the widow and the others devisees under an alleged will of late Ramaparsad. The only question which was argued, or could be argued at the present stage, was the validity of Ramaparsad's own title, claiming, as he did, under Taukuram, both being illegitimate sons of a Hindú married woman of the Gauda Brahmin caste, by Hughes, an Englishman. It was admitted on behalf of the plaintiffs that, for a state of facts so anomalous, it could not be pretended that any special custom could be alleged, and the right of Ramaparsad to succeed was put upon the general grounds of Hindu law. Before, however, noticing the arguments upon this point, it will be convenient to consider the objection of the Advocate General that the deci-

(a) Present: Phillips and Holloway, J. J.

sion of the Judicial Committee, unless special custom can be shown, concludes the question. It might be sufficient to say that the order of Her Majesty in Council constitutes the decision, and that in the order, framed as we find with great deliberation and with the assent of Counsel on both sides, the subject is manifestly left open : "And that it be ordered that the Sadr Court do make all such further enquiry as may be proper and necessary as to the title of Ramaparsad as the heir of Taukuram." So much deference, however, is due to the judgment of their Lordships, that, although we should be bound by the language of the decree to consider the question open to us, we should necessarily be greatly influenced by any conclusions which their Lordships have categorically expressed. It appears to us, however, that, taking the whole of the judgment together, the language is not susceptible of the construction that Ramaparsad cannot succeed on the general grounds of Hindu law.

At page 424 their Lordships say, "On the one hand they are not prepared to act upon the opinion of the Law Officers given upon an imperfect statement of facts, unsupported by authority, and apparently not easily to be reconciled with the opinions of the text writers on the Hindu Law. On the other hand, they do not feel satisfied that the opinion of the Law Officers may not be well founded, *more especially* with reference to some local custom or usage. They have come to the conclusion, therefore, that the only safe course which can be taken is to remit this question to India for further investigation and consideration." Now the words, "more especially with reference to some local custom or usage," seem clearly to show that their Lordships did not mean to express an opinion that the view of the Law Officers might not be well founded upon a basis other than that of local custom or usage. The words "more especially" would otherwise be insensible.

It is not, however, to be denied that the language of the passage, immediately preceding this, is somewhat stronger. "It is, however, impossible to treat these sons as the sons of "a Sudra father; if the plaintiff and Taukuram be viewed "as the sons of a Sudra mother, still the property never "was hers, and their heritable capacity even to property of

1864. November 8. R. A. No. 9 of 1856.

"heirs has not been established. If any general usage in "this part of India has ripened into a custom having the "force of law, that the illegitimate children of a woman "pursuing an unchaste course of life, whether married or "unmarried, inherit her property, this custom is not in proof. "If amongst Sudras proper a course of decisions, or other "evidence of the prevalency of a general custom, supports a "heritable capacity of illegitimate Hindús beyond that "which the writer's text books establish, these decisions "have not been made known, nor has that custom been "established. But a title such as the present, so wholly "irreconcilable with the expositions of any text writer, and "unsupported by any authority, cannot be established upon "the evidence which this case affords. To assume without "evidence, on assertion simply, a capacity in the appellant "and his uterine brother to inherit to their mother, and "assuming that capacity of lineal inheritance to their mother, "thence to derive collateral heirship, *inter se*, to property "which never was their mother's, would be at variance with "legal principles." Construing it, however, as we must do, with reference to that previously read and to the order finally made, we cannot consider ourselves precluded from dealing with the question as one left entirely open.

For the plaintiff it was argued that the case is one of first impression, that the case is really that of a prostitute, and Sec. 363 of Strange's *Manual* shows that there is heritable blood between the degraded mother and her children ; that the property is self-acquired ; that there is no text whatever of Hindu law which excludes inheritance between persons so situated ; that Taukuram and Ramaparsad were brothers; that in default of issue the mother succeeds to her sons, and that Ramaparsad's right to succeed to his brother would devolve from her ; that the right of the children of professional prostitutes to succeed to their mother has been frequently recognized.

On the other side it was contended by the Advocate General, quoting *Strange's Hindu Law*, Vol. I, page 160, that the mother and the children too were altogether beyond the pale of Hindu law ; that she was *civiliter mortua ;* that her rights had altogether ceased, and that she could neither acquire nor transmit rights ; that this was the fruit,

not only of illicit, but of adulterous intercourse, and that there could be no possibility of inheritance. The Advocate General was then proceeding to contend that, Ramaparsad's claim being removed, the right vested by the rázínáma in his clients. The Court, however, considered that this question was not open to him, because the judgment of the Lords of the Council had distinctly determined that the rázínáma conveyed no right to property, but merely settled the right of management; and also because the question was not within the scope of the reference.

1864 *November 8.* *R. A. No. 9 of 1856.*

No other authority was quoted on either side, and none applicable to this case appears to have been quoted in the Privy Council.

The Lords of the Judicial Committee have determined that these persons have been rightly considered to be Hindús, and the question of their right is to be solved by the determination of the class of Hindús to which they belong, and the rules as to inheritance which exist in that class. If, however, from the anomalous circumstances of this case, they cannot be with positive certainty referred to any particular class, it seems to us that we are bound to reason analogically, and apply to them the rules observable by classes to whom theirs bears the greatest likeness. This seems to be the rule of equity and good conscience, which, by our Charter, we are bound to apply where no positive provision of law exists.

We may at once remove from the question all consideration of the issue being adulterous, on which much stress was laid in the argument. There is no doubt that mere adultery, if committed with a man of the woman's own caste, would be expiable. The husband might put her away, but would be by no means bound to do so. The ancient law is clear upon this subject, *Manu*, Cap. XI, Secs. 177 and 178, prescribes the penance for adulterous connection. The provisions as to the son of concealed birth *(quæsitus filius)* being entitled to inheritance to the husband of the mother (*Colebrooke's Digest* 249 and 250) show clearly that mere adultery is not the disabling stigma which codes based upon Christianity have made it. Still more curious is the conflict of opinion, developed by the commentator in the suc-

1864. November 3. R. A. No. 9 of 1856.

ceeding clauses, as to the proper paternity of the child begotten upon the wife of another (*Col.* 252 and 253 with notes). The fact that the procreator of these children was impressed with a peculiar status preventing his illegitimate children from inheriting to him renders it unnecessary to pursue this investigation, and we have only adverted to it to shew that the mere fact of adultery is of very little importance to the present investigation. In the view of Hindú law these children were stained with a blot wholly indelible, and in comparison with which the mere adultery of the mother fades away. On this evidence she must be taken to have been what is termed a Gauda Bráhmin, really the product of the union of a Bráhmin with a Kshatriya woman, and according, therefore, to the theory of Manu, of a caste intermediate between the two first regenerate classes. She must be taken, therefore, to have been at least a Kshatriya in rank. As to the father, he was not a Hindú at all. Looking at *Manu*, Cap. X, Section 44, where he numbers the races, once Kshatriyas, who have from non-communion with Bráhmins and their omission of holy rites that are there prescribed by the Shástras, sunk to the lowest of the four classes, it is probable that he would have considered this man of the Caucasian race in the position of a Sudra. If not a Sudra, he was in the eye of Hindú law a man of no caste at all, a Meleecha or foreigner.

The question is, however, of little importance, for no degradation could be greater than connection with a Sudra, and there can exist and does exist no question, that by such connection the woman became hopelessly outcast, and it must be assumed that, living as she did in this open concubinage with a man not of her own caste, she was treated as dead to the family of her husband, and it is to be remembered, as the Abbé Dubois justly points out, that the person so sunk from caste does not descend to any lower caste, but becomes altogether outcast.

It seems to us that the mother must be taken to have been a woman of no caste, living in prostitution.

Before, however, dealing with the rule which so governs, we must address ourselves, with all respect, to the observations of their Lordships at pages 423 and 424 of the report, which we have already quoted.

Certainly there are many passages of the text-writers which recognize the relationship of the son, irregularly begotten, to his mother's family. *Yajnavalkya* quoted in the *Vivâda Chintâmani* (p. 823). "A damsel's child is one born of an unmarried woman: he is considered as the son of his maternal grandsire." This passage clearly recognizes the mother and her son irregularly begotten, as cognate, and the *Mitacshara* quoting *Manu* (Cap. I, Sec. XI, Cl. 7) points out that, if the girl is married, the child, although not begotten by the husband, becomes his son. The authorities already referred to, as to the son of concealed origin, also bear upon this point, and seem to show clearly that the Hindú law, although for obvious reasons not recognizing as the husband's son one got by a man of unequal class, nevertheless gives no ground whatever for supposing, that the circumstance of birth from illicit connection severs the union between the mother and her son, so as not to admit of heritable blood between them. This being so, there seems no ground, either of authority or analogy, for contending that, if Taukuram had died without issue, his mother would not have succeeded to him. This would equally have been the case, if she was a Sudra or of a class still lower, as we think that, in the view of Hindú law, she was. That the illegitimate offspring of women of the lowest Hindú classes daily succeed to the property, both of their mother and of one another, without question or dispute, we can, upon our own experience, affirm. It would be illogical if it were otherwise, for the illegitimate son of a Sudra, in the absence of preferable sons, is his heir. That the property is almost invariably small of itself prevents any question coming before the Courts. Further, the practice is so well understood that litigation would be hopeless. We may refer, by way of analogy, to the practices of Malabar and Canara, which received Hindú law not in its present state, but in a condition of which traces are still observable in the books. There, concubinage is the rule, and the whole law of inheritance is based upon the existence of heritable blood between the mother and son, quite irrespectively of the father. There is no agnation at all. Nor does the archaism of the Hindú law in those provinces attenuate the force of the argument from analogy. The modern form of Hindú law provides for the state of a homogeneous people, but even

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in Manu there are ample traces of a period in which various tribes intermixed with one another, when the rigid demarcation of the various classes had not yet been made. It is obvious that the present far more nearly resembles the more ancient than the more modern condition of the country. There is very little authority upon the question now at issue. All the passages to be found in the text-books have reference to the right of inheritance *ex parte paternâ*. That from the younger Macnaghten, quoted in the Privy Council, is of that character, and it is wholly unnecessary to consider whether his opinion is well or ill-founded. The doctrine of Mr. Justice Strange in Section 363 of his Manual is fully borne out by a dictum in the case quoted.(a) It was a suit by the daughter, born in wedlock of a mother who afterwards lapsed into prostitution, to recover from the daughters born in prostitution the property of the mother. The Court held the plaintiff's title not made out, because the conduct of the mother had entirely severed her from her natural family, so that the plaintiff, the daughter born in wedlock, could not succeed to her. There is also the dictum that the prostitute daughters are entitled to succeed, but the plaintiff's case failing this was not actually necessary to the decision. In Madras too it has never been doubted that the children of the prostitute succeed to the property of their mother. We have been unable to find the least authority, either in the books or in practice, for an opinion of Mr. Justice Strange that the children must be adopted children. The decisions upon the question are not numerous, as indeed they seldom are upon points so well established as to leave to the reckless litigants of this country no hope of benefit from contesting them. The newspaper report of a case in the High Court of Bombay contains the opinion of the Judges, in a case which did not call for it, that the Courts in future ought not to undertake the settlement of questions of inheritance between persons of the prostitute class and their offspring, whether natural or adopted. The Court, however, admitted that their own precedents were in favour of doing so. The case was there one of an adopted daughter, and of course there would be much reason for contending that there was an intention to

(a) *Tara Munnee Dassea* v. *Motee Buneanee*, VII Sadr Dew. Ud., 273.

bring up the child, when so adopted, to prostitution. Even therefore if the case could be considered an authority, it would be none upon the present question.

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Our reasoning, therefore, is that there is no authority against the existence of heritable blood between the woman and her illegitimate offspring. Taukuram and his brother are decided to be Hindús. They are the Hindú sons of a woman, who was either a woman of a class lower than the fourth of Manu's classes, and in this case the sons are cognate to her and to one another, as the children of a class not twice-born out of wedlock, and entitled to inherit to their mother, and only not capable of inheriting to their father because he is not a Hindú at all. If not so, she is a mere prostitute, and of the cognation between her and her offspring there exists no doubt whatever.

All the analogies of Hindù law, as we have already shown, are against the view of a bastard taken by the law of England. There is an element in that law, the doctrine of Christianity, which would render any argument drawn from its provisions merely deluding. There is and can be no analogy.

The Roman Law, however, which still dominates over all systems of European Law, "non ratione imperii sed rationis imperio," has dealt with this question. We know not whither, in the absence of positive authority, we can so profitably resort for a rule of equity and good conscience as to the eminently philosophical, but also eminently practical, minds of the great Roman Jurists, and especially to those who treated the subject before its character assumed a different aspect from the introduction of Christianity.

Gaius says (a) "Hâc parte (that is of the edict) proconsul, naturali æquitate motus, omnibus cognatus permittit bonorum possessionem quos sanguinis ratio vocat ad hereditatem, licet jure civili deficiant. Itaque etiam vulgo quæsiti liberi matris, et mater talium liberorum, item *ipsi fratres inter se* ex hâc parte bonorum possessionem petere possunt quia sunt invicem sibi cognati." This great master considers, that, in not denying the natural relationship between the erring mother and her sons and of

(a) Dig. Tit. VIII, fr. 2.

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the sons with one another, and admitting heritable blood between them, the prætor was moved by natural equity. Whether this doctrine or that of the law of England is more strongly marked by the spirit of the great author of Christianity seems to us not very doubtful.

At fr. 4 of the same title—"Si spurius intestato decesserit jure consanguinitatis aut agnationis hereditas ejus "ad nullum pertinet, quia consanguinitatis et agnationis "jura a patre oriuntur, proximitatis autem nomine mater "ejus aut frater eâdem matre natus bonorum possessionem "ejus ex edicto petere potest."

Ulpian points to the true distinction, and one which precisely meets the present case and is entirely in conformity with the doctrines of Hindú law. As agnation and consanguinity are the offspring of a marriage by the *jus civile*, no spurious son can have them, but he is related to his own mother and to his brother by that mother.

Justinian, Inst. III, Tit. V, 4, embodies the same rule which by later legislation he modified.

Feeling satisfied that all the analogies of Hindú law and the plain rules of equity and justice are in favor of the evidence of heritable blood between the illegitimate sons of Hughes by this Hindú mother, we resolve to direct the Civil Judge to try the question :—

Whether the will set up by the appellants was in fact executed by Ramaparsad ?

The costs of this application will be costs in the cause, and will be disposed of on the delivery of a final judgment.

Issue directed.

Appellate Jurisdiction.[a]

Referred Case No. 14 *of* 1864.

ARULU MASTRY *against* WAKUTHU CHINNAYEN.

A bond stipulated for payment of principal and interest at one per cent. per mensem within six months from the date of the bond, and in default that the rate of interest should be raised to six and a quarter per cent. per mensem :—*Held* that the higher rate of interest was not in the nature of a penalty, and that the plaintiff had a right to enforce payment thereof.

1864. *November* 14. *R. C. No.* 14 *of* 1864.

THIS was a case referred for the opinion of the High Court by L. C. Innes, the Civil Judge of Ootacamund.

No Counsel were instructed.

The facts appear sufficiently from the following

JUDGMENT :—The plaintiff in this case seeks to recover 100 Rupees due upon a bond, with interest at 6¼ per cent. per mensem. The bond stipulated for the payment of the principal with interest at one per cent. per mensem within six months, and that, in default, the rate of interest should be raised to 6¼ per cent. The learned Judge who tried the case regarded the the stipulation for the higher rate as a penalty and declined to enforce it, subject to the decision of the High Court.

The point, in our opinion, admits of no doubt. The subject-matter of the suit is a valid written contract *boná fide* entered into, and the meaning of which is perfectly clear. The plaintiff, therefore, upon proof of default of payment on 30th August 1864 was entitled to recover interest at the increased rate agreed upon. If the bond had provided simply for interest at 6¼ per cent. per month, the Judge would, without doubt, have given Judgment for interest at that rate. In the present suit the plaintiff was entitled as a matter of contract to the increased rate of interest after the 30th August 1864. There is no ground for treating the higher interest as a penalty in the legal sense of the term, and in this case considerations as to the probable

(a) Present: Scotland, C. J. and Phillips, J

1864. November 14. R C. No. 14 of 1864.

motives and calculations in the contemplation of the parties, when the bond was entered into, cannot be allowed to effect in any way the contract right secured to the plaintiff in express terms.

If the Judge is of opinion that the defendant's straitened circumstances forced him to incur the liability to so extravagant a rate of interest, he may, in his discretion, refrain from allowing interest from date of suit or upon the sum decreed; or he may allow such interest at a very moderate rate.

Appellate Jurisdiction.(a)

Regular Appeal No. 35 *of* 1861.

COLLECTOR OF MADURA......................*Appellant.*

SRIMATU MUTTU VIJAYA RAGUNADA MUTTU RAMALINGA SETHUPATI...................... *Respondent.*

Regular Appeal No. 49 *of* 1861.

ANANDAYI *alias* KUNJARA NATCHIAR and others.. *Appellants.*

RANI PARVATAVARDANI NATCHIAR and others.. *Respondents.*

A widow can adopt a son without the consent of her husband according to Hindú Law.

Where a widow adopted a son with the assent of the majority of the surviving kindred of her husband, the adoption was held to be valid.

In such a case if the requirement of the consent of the Sapindas be anything more than a moral precept, the assent of any one of the Sapindas will suffice.

1864. November 17. R. A. No. 85 of 1861 and R. A. No. 49 of 1861.

THESE were regular appeals against the decrees of the Civil Court of Madura, in Original Suits Nos. 3 of 1856 and 1 of 1860.

The Advocate General, Mayne, Dale, (Government Pleader) *Tirumaláchdriyár* and *Srínivásáchdriyár* appeared for the parties.

The facts are sufficiently stated in the following

JUDGMENT :—These appeals are brought from decrees of the Civil Judge of Madura, in Original Suit No. 3 of 1856 and Original Suit No. 1 of 1860.

(a) Present : Frere and Holloway, J.J.

1864. November 17. R. A. No. 85 of 1861 and R. A. No. 49 of 1861.

The former of them was brought by plaintiffs as widow and daughter of Muttu Vijaya Ragunáda Sethupati, a former zamíndár of Ramnad, to establish their reversionary right to the property as against the present zamíndár in possession, and to obtain an annual allowance of Rupees 24,000 as maintenance, and to declare null an adoption, purporting to have been made by the present zamíndár, as unauthorized and in prejudice of their reversionary interest. By order of the Court the son alleged to have been adopted, the Collector of Madura, and others, were included in the suit.

The second of these suits, No. 1 of 1860, was brought by Muttu Vijaya Ragunáda, alleging himself the adopted son of Parvatavardani Natchiar, the present zamíndár, against the adoptive mother and the Collector of Madura, to establish affirmatively the adoption, to have declared illegal an announcement of the Collector that on the death of the present zamíndár the property would be escheated, and to cause the property to be put in his possession.

On 12th April, 1861, the Civil Judge made a decree in the former of these suits, declaring that the reversionary right claimed did not reside in the first plaintiff, and that the zamíndár should pay maintenance at the rate of Rupees 400 per month with arrears from the date of the bringing of the suit to her, and Rupees 100 per month to the second plaintiff.

On 18th March 1861, the Civil Judge decreed for the plaintiff in Original Suit No. 1 of 1860 on the grounds that the zamíndár had a right to alienate during her life, and that the Collector had no right to escheat the property of a person who, by his own answer, appeared to have heirs.

On the 19th March 1863, the appeals of the plaintiff in 3 of 1856 and of the Collector of Madura, second defendant in 1 of 1860, came on to be heard.

One of the objections of the appellant in 49 of 1861, (the plaintiff in 3 of 1856,) was that the judgment of the Civil Judge had gone upon a decree, that in 1 of 1860, made in a suit in which she was not a party, and to which she was not made a party.

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The Court, by its Order dated 26th March 1863, directed that the following issue should be determined in each of these suits :—

"Was the adoption made with the authority of Muttu Virayi Natchiar, widow of Annaswámy *alias* Ragunáda Sethupati, or with that of any others of the kindred of the late zamíndár Ramaswámy Sethupati, in whose behalf the said adoption was made?"

And it was accordingly tried by the Civil Judge—all the parties now before the Court being parties by consent to that proceeding. The effect, therefore, was the same as if a formal order had been made, admitting the plaintiff in 3 of 1856, a defendant in 1 of 1860, and so treating the case. The second defendant and the plaintiff in 3 of 1856 have appealed against the finding of the Civil Judge that an adoption was made of the plaintiff in 1 of 1860 and that it was made with the assent of Muttu Virayi Natchiar, widow of Annaswámy, and of all the surviving nearest kindred of Ramaswámy Sethupati, the late zamíndár. To avoid all difficulty, however, we have by consent made an order *nunc pro tunc* for the admission of that plaintiff.

From this decision the Collector of Madura and Kungara Natchiar, widow of Ragunáda, both appealed.

It will be convenient to consider, first, whether a widow without the assent of her husband can make an adoption good in point of law.

The question was twice argued, on the second occasion very ably and elaborately, at the bar, and there are now at all events ample materials for judgment, and for the correction of that judgment if found erroneous by a higher tribunal.

On the first argument it was assumed, and no attempt was then made to show the contrary, that this question was stated in the affirmative by the note of *Mr. Colebrooke* to the *Mitacshara*. The effort of counsel was directed to showing that the note was in fact based upon no authority and was opposed to the greatest authorities. The words of that note are :—

"In regard to a widow's power of adopting a son, there is much diversity of opinion. *Vachespati Misra*, who is

followed by the Mithila School, maintains that neither a woman, nor a Sudra, can adopt a dattaca or given son; because the prescribed ceremony (Section 13) includes a sacrifice, which they are incapable of performing. This difficulty may be obviated by admitting a substitute for the performance of that ceremony, and accordingly adoption by a woman, under an authority from her husband, is allowed by writers of the other schools of law. *Nanda Pandita*, however, in his treatise on adoption, restricts this to the case of a woman whose husband is living, since a widow cannot, he observes, have her husband's sanction to the acceptance of a son. On the other hand, *Balambhatta* contends, that a woman's right of adopting, as well as of giving, a son, is common to the widow and to the wife. This likewise is the opinion of the author of the *Vyavahára-mayukha*: but, while he admits that a widow may adopt a son without her husband's previous authority, he requires that she should have the express sanction of his kindred. Writers of the Gaura School, on the contrary, insist on a formal permission from the husband declared in his life-time."

It seems to have been constantly assumed that, by these words, *Mr. Colebrooke* means all the followers of the *Mitacshara*, and consequently the whole of the inhabitants of Southern India. This would, however, render the words unmeaning, for all schools, except that of Bengal, are followers of the *Mitacshara*, and by specifying the followers of two particular schools an obvious distinction is expressed between these two and other schools following the same treatise. That this is the meaning is sufficiently shewn by the following passage of *Mr. Colebrooke's Preface* to his translation of the *Dayabhága* and *Mitacshara*:—

"The works of other eminent writers have, concurrently with the *Mitacshara*, considerable weight in the schools of law which have respectively adopted them, as the *Smriti Chandrica* in the South of India; the *Chintámani*, *Ratnakara* and *Viváda-chandra* in Mithila; the *Viramitrodaya* and *Kamalacara* at Benares, and the *Mayukha* among the Mahrattas: but all agree in generally deferring to the authority of the *Mitacshara*, in frequently appealing to its text, and in rarely and at the same time modestly dissenting from its doctrines on particular questions."

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This passage compared with that at page 3 of the same *Preface* in which the Bengal and Banares Schools are spoken of generically, shows that the learned author was at page 4 speaking of the Benares School specifically, as one division of the Benares School treated generically, and applied as the name of all schools following the *Mitacshara*.

When the case was first argued, although no authority prevalent in Southern India was quoted for the doctrine, adopting the view of the passage generally entertained, we felt that it would be impossible to overrule, in a cause not before us as a Court of last resort, the opinion of a jurist so eminent as *Mr. Colebrooke* which had been so long before the public. When, however, the note was examined, it really only applied to schools other than those of Southern India, and looking at the absence of Native authorities, and the very large number of authorities against this position, it was considered necessary to intimate that we should like this point of law re-argued. That argument, which was very able and elaborate, was heard on three days before the adjournment, and it remains for us to deal with the authorities quoted on both occasions.

The pundit's opinion in this case may be at once set aside; he has absolutely interpolated the word "venerable protectors" into a passage of *Vasishta*, which is the basis of all the commentaries upon which we have to remark. We believe this to be a very fair example of the manner in which the pundits have, for a long series of years, been accustomed to give their opinions, and the fact that the custom of the late Sadr Court was to follow those opinions, without any scrutiny of the materials upon which they were or professed to be based, renders us unable to attach to their decisions and dicta the weight to which the decisions of a Court of Justice, founded upon its own deliberate examination of real authorities, would be entitled.

It will however be better to deal first with the decided cases.

The first is the case of *Veerapermal Pillai* v. *Narrain Pillai*,[(a)]. At page 103, the learned author says :—"Hence it may be inferred, what appears confirmed by opinions of

(a) 1 Strange's Notes, p. 78.

living Hindú lawyers and by every case of the kind we are acquainted with, that the consent of the husband is indispensable to adoption into his family." This is not, however, a decision upon the question, for there was in this case a written authority to adopt. The *dictum*, however, of Sir T. Strange, who, although often complaining of the obscurity of the subject and of the necessarily imperfect performance of his task, may fairly be said to be the only writer who has in this Presidency drawn as far as possible from original materials and exercised an independent judgment upon them, is of weight, as the opinion of such a person and as showing the views of the subject prevalent at the time at which the judgment was delivered. This *dictum* must be considered in connection with that at page 79 of the learned Judge's book:—" and according to the doctrine of the Benares and Maháráshtra Schools prevailing in the Peninsula, it (that is the consent of the husband) may be supplied by that of his kindred, her natural guardians." We must observe, with all respect, that this passage is somewhat vague. The Peninsula is the old name of Hindustan from the Himalaya Mountains to Cape Comorin. If the learned Judge is speaking of the Benares School generically, then the Mahratta School is merely a species, but it is obvious that he is speaking of two schools which are themselves species of the school of Benares.

In the Preface of *Colebrooke*, and in that of the younger *Macnaghten* (page 21), the existence of five different schools of law, of which the specific Benares School and the Mahratta are two, is clearly shown. The passage in Sir T. Strange differing, therefore, from his opinion delivered judicially and applying, as it must naturally be taken to do, not to the school of Southern India, but to the Benares and Mahratta Schools, can by no means be considered to have overruled his original opinion. The authorities quoted for the opinion are at pages 92, 96 and 115 of of his *Appendix*.

The first case contains the opinion of a pundit, that a widow may adopt, having her husband's authority—not without.

Mr. Colebrooke's remark is merely a repetition of the note to the *Mitacshara* so often referred to, although un-

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doubtedly the language used gives color for the argument that he intended to place the doctrine of the Bengal School in opposition to that of the *Mitacshara* and of its followers generally. The natural meaning of his words however expresses no such general antagonism; they are still confined to a class of followers of the *Mitacshara* and those not its followers in Southern India.

The case at page 95 embodies the opinion of a pundit, that the authorization of a dying son to an adoption by his mother of another son in his stead will validate the adoption. Mr. Colebrooke's remark is very singular. The author of the *Mitacshara* is called the *Vijnyaneswara*, as if a book, and this emboldens us to suggest that from error of transcription the word Meyacha, of which we have not been able to ascertain anything, has been written for Mayucha.

The language undoubtedly is subject to the same observation as that upon the former case. The language is, however, much more general than that in the note to the *Mitacshara.*

The general meaning of Mr. Ellis' commentary seems to be that, although his mother's guardian, he does not inherit his father's power of authorizing an adoption.

The case at page 115 stated simply a contract between the mother-in-law and widow for the widow to adopt a particular boy, and the adoption of another boy by the widow without the privity of the mother-in-law. The pundit says that an adoption will not be invalidated by an unfulfilled contract with the mother-in-law to adopt another boy. Mr. Colebrooke, on a case not raising the question at all, repeats his note to the *Mitacshara*, and Mr. Ellis says that, if it is admitted that the widow had her husband's assent or that as a Sudra she did not require it, the answer will be correct. We may observe that Mr. Ellis, who had much oral intercourse with natives, invariably shows a disposition to assert the existence of peculiar customs. Those who have had much experience of Hindús will find them always unwilling to assert that any given practices are not perhaps authorized by custom. By this they mean only that people indulge in such practices.

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No law is based so much as the Hindú upon written authority. This is true even in such provinces as Malabar and Canara, and an alleged custom, unauthorized by any written authority prevalent in the place in which it is sought to enforce that custom, must be regarded with the greatest suspicion. As to this suggestion of a looser mode of adoption for Sudras, we have been unable to find any authority, despite the tendency of the Bráhminical authors of most treatises upon Hindú law to enunciate that from their utter unimportance in the eye of the Supreme Being Sudras may do anything. The result then of Sir T. Strange's passage is, that he has nowhere as an author directly overruled his opinion after full enquiry expressed extra-judicially from the Bench—although it is quite clear that, with his disposition to submit implicitly to Mr. Colebrooke, he thought that the adoption by a widow with the assent of her husband's male relations would be valid, and he probably thought, although of this looking, merely at his language, there is no positive evidence, that such was the rule in Southern India. The position stands still upon Colebrooke's note.

No. 18 of 1814, reported 1, *Select Decrees*, contains a pundit's opinion at page 104. "A widow may adopt a son with the consent of her husband or with the consent of her relations—thus it is declared. in *Datta Mimámsa*, *Vivâda Sararnavam* and *Lohita Dharmam* and other law books; and in conformity therewith is the custom of this country."

Now there are several books called *Datta Mimámsa*, and if it is meant that this statement is to be found in the most celebrated treatise of that name, the one by *Nanda Panditra*, it is almost unnecessary to say that it will be found not to be true. A more unsatisfactory opinion than this can scarcely be conceived, and it is wholly extra-judicial, for the case, badly as it is reported, shows that the widow adopted under a contract with her husband to do so in which his permission was necessarily involved. Moreover, it embodies the position that her relations are the persons to assent. For this position the modern advocates of the doctrine do not contend. The pundits, too, conscious of the weight of the Shibboleth of custom, are careful to insert this at the end of their opinion.

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No. 5 of 1817 is no authority upon this question of adopting a son; it is a direct authority for the power of the widow to give a son in adoption after the death of the husband. This is in accordance with the doctrine of *Devanda Bhatta* although opposed to that of *Nanda Pandita*, and is undoubtedly the opinion at present entertained, nearly all schools having followed the *Dattaca Chandrica* in preference to that of the *Dattaca Mimâmsa* where these celebrated treatises differ.

Of the cases from the Bombay Presidency which have arisen in Courts following the Maharatta school of law, and the *Vyavahára Mayukha* which is the authoritative treatise there, we may observe that it is beyond all dispute that it is there held clear that the widow may, without the consent of the husband, adopt a child. The real authority of that treatise belongs to another part of this discussion.

Special Appeal Suit No. 5 of 1849, contains merely another pundit's opinion. The alleged adoption was negatived, and the nature of the authority required was not therefore at all in question.

In No. 161 of 1856 (*Sadr Decisions for* 1858, *pp.* 5, 6) the Principal Sadr Amín of Cuddalore, himself a native, decided that the adoption of the claimant was invalid, because made subsequently to the husband's death and without his authority, and that the claimant had not therefore lost his right in his natural family. The Sadr Court reversed this decision, on the ground that the authorization of the husband was supplied by that of his nephew and nearest male relations. This therefore is, on the authority of Mr. Strange's *Manual of Hindu Law*, a direct decision, and is the first real decision upon the point, and the only authority referred to is that of Mr. Strange, whose book is an abridgement of his father's.

The cases at pages 91 and 93 of the *Madras Sadr Reports* for 1862, and that at page 39 of the *Decisions* for 1863, are no authorities upon the point. These cases went upon the then very prevalent doctrine of acquiescence; whether rightly or wrongly applied is not now the question.

Appeal Suit No. 53 of 1861 is a Malabar case and has many peculiar features. The plaintiffs are alleged to be two

sisters, widows of the same husband. One of these marriages must have been altogether irregular and illegal, too. The suit was to recover property from two persons whom they alleged to have been introduced into their family with the assent of their paternal uncle for their protection and for the management of the property. The adoption of two persons, a transaction altogether illegal upon the ordinary principles of Hindú law, was upheld by the Civil and Sadr Courts ; but the language of the Sadr Court is, "The adoptions being thus proved and having prevailed for so many years, it is not open to the plaintiffs to challenge the legality thereof." This can therefore scarcely be considered a decision upon the question, because the Court seems to be of opinion that, whether legal or illegal, the transaction was no longer open to question, because of the conduct of the plaintiffs.

Two cases of inferior Courts, one in 1850 before the Civil Court of Trichinopoly, and the other in 1863 before the Principal Sadr Amín of Madras, declared the assent of a male relation sufficient to authorize the adoption of a son to the husband. The Principal Sadr Amín quotes Strange's *Manual* and the *dictum* of the pundit in No. 18 of 1814, already referred to, and the decision of the Sadr Court already quoted.

Three French cases were also quoted. In the one in 1826, the length of the time during which the adoption had been recognized was an important element in the decision. We are also bound to say that we are unable to attach much weight to an opinion conveyed in the following vague language, "*Considérant que d'après les lois and les coutumes du pays suivant le Dharma Shástra.*" Dharma Shástra is a generic name for any law book and when used specifically for Smritis; in them we have nothing upon the subject. In another case before the Royal Court at Pondicherry in 1844, the Court distinctly declared, but without any quotation of authorities, that it was the recognized doctrine that in certain parts of India the consent of the husband "*peut être remplacée par consentment des parents de sa famille et qu'il parait certain qu'il est d'usage immemorial á Pondicherry de se contenter de cette derniére autorisation.*"

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It is singular that a custom so universally recognized should, as it appears, be disputed upon almost every recurrence of the question. The same statement is contained in a case before the same Court in 1848. No one of these cases contains any examination of the authorities, and the validity of the adoption has in the present case been put upon the provisions of positive law, upon which alone it can really stand, and custom, even if really existing, is no more than evidence of that law.

One other case was quoted for the appellants as a positive decision that in provinces governed by the Benares School of law the express assent of the husband was required, and by the respondents, because it admitted the position that this ancient rule had in many places been modified. The case is reported in II *Knapp*, 203. The question arose in the zillah of Etawah in the North Western Provinces, subject to the Benares School of law, as we know, both from its geographical situation and from the *Mitacshara* being quoted as an authority both by the pundits who affirmed and by those who denied the validity of an adoption without the express assent of the husband (page 207 of the Report). The Bengal pundits relied upon the *Mitacshara* and the *Dattaca Chandrica*, and the note of Mr. Colebrooke, so often referred to, and the passage of Sir T. Strange were quoted in favor of the validity of the adoption. This therefore is an express decision that there are places, governed by the Benares School of law, in which no assent but that of the husband will be sufficient to validate a widow's adoption.

It is impossible, however, not to notice the great embarrassment felt by the eminent and most cautious Judge who delivered judgment in this case. He repeatedly laments the absence of authority, admits that a rule less strict than that laid down prevails in some places and particularly in the Mahratta States, but he feels unable to say that the ancient rule of law has been relaxed in the place from which this suit came. The actual judgment amounts to little more than saying that it is impossible to say, in opposition to the pundits of the Sadr Court of Bengal and of the Provincial Court of Benares, that the Court was wrong in considering the assent of the husband absolutely essential. The mate-

rials contained in a case which, coincidentally with this, was before the Sadr Court of Bengal (*II Sadr Dew.* 170, 171), were also before the Privy Council. The pundits of the Sadr Court of Bengal quoted the *Viramitrodaya* and *Sanskar Kaustubha*, works of paramount authority in the special school of Benares, and declared their authority overruled by the *Dattaca Mimámsa* of *Nanda Pandita*. So far, therefore, as the decision goes, it is an authority for the paramount weight of the *Dattaca Mimámsa* over the treatise specially applicable to Benares, and in a case arising in a zillah proximate to Benares itself. Moreover, the case overruled the opinion of Mr. Colebrooke, if that opinion can be supposed to mean that the assent of the husband is not indispensable in countries following generally the doctrines of the *Mitacshara*. It is also of course an authority for the position that the *Dattaca Mimámsa* requires the direction of the husband to enable affiliation of the boy given to and accepted by the widow.

There is therefore one express decision only of the Sadr Court in favor of the sufficiency of the consent of kinsmen. To this are to be opposed the *dictum* of Sir T. Strange and the judgment of the Privy Council, which, subject to the observations made upon the language of the learned Judge, tends in the same direction. We are unable, therefore, to see that there is such a weight of judicial authority as can properly preclude or exonerate us from scrutinizing the original authorities upon the subject.

In dealing with the passages which have been presented, it is obviously necessary, so far as possible, to ascertain the title of their authors to respect, either from the weight attached to them among the people for whom they wrote or from the intrinsic weight of the reasoning upon which their conclusions are based. The following passage of the younger *Macnaghten* (Prf. page 21) which follows his statement that while all the schools follow the original Smritis, each of the five schools has particular commentators to whom it attaches marked preference—says, " The *Mitacshara*, the *Smriti Chandrica*, the *Madhavyam* and the *Suraswiti Vilása* are the works of paramount authority in the territories dependent upon the Government of Madras."

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How important too is the caution of the learned author—"I do not mean to affirm that these are the only works of paramount importance recognized in the respective schools; but they are most frequently referred to; they are sufficient to solve the ordinary legal questions which arise; and suspicion may justly be excited where an exposition of law is supported by citations from more recondite authorities." He then proceeds to show the general prevalence over all the schools of the *Dattaca Mimámsa* of *Nanda Pandita* and the *Dattaca Chandrica* of *Devanda Bhat.*

Nanda Pandita, an author born in Southern India, is of course a distinct authority that the widow can neither give nor receive a son. He quotes from *Vasishta*, one of the original legislators, the passage which the subsequent commentators have professed either to explain or perhaps to explain away, and he then says: "If it is intended then that she may adopt a son with the assent of the kinsmen even, it is wrong, for the term husband would become indefinite: and the purpose would not be allowed. Now the purpose of the husband's sanction is that the filiation as son of the husband may be complete even by means of an adoption made by the wife." The reasoning is, it is an unwarrantable extension of the term husband to include all his kindred within it. Moreover, such inclusion would be contrary to the reason of an adoption which derives its efficacy from the conjunction of the will of the husband with the act of the wife. This by a fiction of law renders the adoption a sort of symbolical begetting, and the son taken is as the son of him whose will has gone with the act of his wife. It is true that *Nanda Pandita* denies also, on the authority of the same passage, the power of a widow to give a son. It is important, therefore, to observe that he at all events regarded the giving and receiving as lying under the same prohibition, and by his specific rebuttal of the notion that the absence of the assent of the husband may be supplied by that of kinsmen it would seem that such an extension of the doctrine had been put forward by some during his time but was repudiated by his rigourism. We find this to be the case, for his treatise is supposed to be an expansion of the *Dattaca Chandrica.*

We then come to the *Smriti Chandrica* and the *Dattaca Chandrica*, works of *Devanda Bhatta*. The *Smriti Chandrica* is a work next in authority to the *Mitacshara* and the *Dattaca Chandrica* is the latest work of its author, intended to dispel any doubts which the former celebrated treatise may have left. In the *Smriti Chandrica* :—" The objector says that the gift of a son by his mother is not proper notwithstanding her power. The reason of this is her want of independence. Refutation.—True, but it is right if it be authorized by an independent male. Hence only *Vasishta* says, ' No woman shall give or receive a son unless with the permission of her husband.' " In the *Dattaca Chandrica* the same celebrated author, in this the latest fruit of his labors, interprets the same passage of *Vasishta* to mean that a son may not be given by a woman without the husband's sanction if he be alive, but that he may be if he be dead, have emigrated or entered a religious order. Then treating as to the persons who may adopt, he (Clauses 4 and 7, Section 1) comments upon the passage of *Manu*, " that a son of any description must be anxiously adopted by a man destitute of male issue," and explains that " It must not be argued that from the qualities of being male and singular being attributed to the adopting party, by the expression ' a man destitute of male issue, something definite is meant : therefore the same person must not be adopted by two individuals, nor any son by women, for the adoption of the *Dwayamushyána* or son of two fathers by two persons will be presently declared, and women with the sanction of their husbands are competent to adopt." He then quotes the same passage of *Vasishta*, and as he put upon it with respect to *giving* the interpretation that the permission was only needed where the husband was alive or not absent on a pilgrimage, it seems reasonable to suppose that he would have put the same construction upon it if he had considered more at length the *receiving* of a son. It would be almost impossible, but certainly unreasonable, to construe it differently in the two places. We have already seen that this is the interpretation put by *Nanda Pandita* upon his doctrines. The opposite interpretation was put upon them by the pundits in the case in *Knapp*, and we are bound to confess that until we reconsidered the passage after the second argument we failed to see its real force and effect. The proper

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conclusion seems to be that the opinion of *Devanda Bhatta* must have been that the assent of the husband stood upon precisely the same footing and was of the same scope in the cases of giving and receiving, for if the words of *Vasishta* requires this explanation in the one case they require it in the other.

The works of *Vidyá Narainsamy* are admitted to have great weight in the Madras School. One of his works is a special treatise upon adoption. Another is a work called *Madhavyam*, a commentary upon *Parasara Smriti*. Mr. Ellis, Sir T. Strange, and Sir W. Macnaghten, already quoted, testify to his authority in Southern India and particularly in the district of Canara. Mr. Ellis says that he may be called the legislator of the last Hindú dynasty, which is that of the Rajahs of Vijayanagar who succeeded the Belal Rajahs. The territories of these Rajahs for a short time embraced nearly the whole of the South of India (*Elph. vol.* ii, *p.* 183), so that the general authority of the Jurist who is said to have been the minister of that founder of the kingdom would necessarily extend over the whole of the widely extended empire. In one place in the *Literary Journal*, Mr. Ellis states, what is unquestionably the case, that where other treatises conflict with the *Mitacshara* they are to give way, while in another he says that there is difficulty in choosing between the *Mitacshara* and the *Madhavyam*. Although this may be considered to put the case too strongly, there is no doubt that this writer is an authority of great weight. It has been said that with many others he was overruled by the Judicial Committee in the *Vasareddy case*. He was, it is true, incidentally referred to in the very vague exposition of the pundits who supported the legality of a second adoption, but no passage from his work was quoted, and it was only too likely that none was to be found there. Basing their judgment, as the Judicial Committee did, upon the work of Sir W. Macnaghten and upon the reasons for making an adoption, it is impossible to consider that the judgment has impaired the general weight of an authority, because that author's name was thrown in by the pundits as a make-weight to their opinion, contrary to that at which the Judicial Committee finally arrived.

The argument of the passage quoted is based upon a mythological tale of a widow who, with the permission of Satyávaty, had connection with Vedu Vyása, by whom she had a son. He then shows from certain passages of Manu, forbidding in the Káli age such sexual connexion although he has minutely described how it is to be performed, that the Ourasa and the Dattaca or given sons are in the Káli age the only recognized sorts of sons, that as the woman in former ages might after her husband's death procure a natural son, so with permission she might also procure a given son who in the progress of time had become the only legal substitute for a son begotten by the man upon his wife. "In the same way the adoption of a son by a widow "with the permission of the father, &c., cannot be censur- "able in the Káli age." In another passage he says, "As for the widow who is subject to worldly ties the adoption of a son should necessarily be made by her." This too must be with the authority of the father and cannot be made of her own accord, because a woman has no independency throughout her life in accordance with the text that "a woman is never independent." We may here remark, although it properly belongs to another branch of the subject, that the Hindú commentators see as great virtues in an Etcetera as was seen by the commentator upon Littleton. The Etcetera therefore in the former of these passages must not be neglected.

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Certain other passages of the same author were quoted on behalf of those resisting the adoption to show the worthlessness of this authority. The greatest stress was laid upon the position that a boy of another Gotram might be adopted and even a boy of a different caste. This certainly is not consistent with the present practice, but it does follow the analogy from actual begetting, for there is no question whatever that a child begotten by a man upon a woman of a lower class whom he has married was by the ancient law perfectly legitimate, and there is no authority, so far as we are aware, to the contrary now. It is of course opposed to the definition of an adopted son given by Manu.

Sri Ráma Pandita, an authority very generally cited in Southern India, has been quoted on both sides. He quotes *Bodhyáyana* for the position that a woman shall

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neither give nor receive a son without the permission of her husband. He then shows historically that the widow was permitted, when childless and her husband dead or absent on a pilgrimage, to procure the begetting of a son upon herself and on behalf of her husband; that this original permission had in the present age been repealed, but that as there was a paramount necessity for a son she might, in circumstances formerly authorizing her to procure the begetting of a son, adopt one. This is, we believe, a fair representation of the author's reasoning; it is involved in a mist of contradictory texts, all quoted apparently with equal approval, but the result of his opinion unquestionably is, that she is not only authorized but morally bound to adopt.

These are all the authorities whom we are at all able to recognize as properly of weight and applicable to this question. If we are to assume, as the Advocate General sought in his argument to show, that the authorities of the Benares and Mahratta Schools are all equally binding upon us; that all the schools except those of Bengal and Mithila are governed by the same rule—then, feeling ourselves bound by the case reported in II *Knapp*, we should be compelled to say that this adoption is invalid. It is quite clear, however, that there are material differences between the several subordinate schools, and that those differences have been always recognized.

It seems to us that it would be trifling with the subject to quote as authorities the works of authors of whom we know nothing; they may be and probably are the speculative essays of Law-students upon jurisprudential subjects. The *Vyavahára Kaustubha*, the *Vyavahára Mayúkha*, the *Vyavahára Mitrodaya*, the *Nirnaya Sindhu* are authorities of other schools. The *Vaidhiya-Nirniyam* and other works of which we know nothing, brought from Tanjore, are of little weight, because the Mahratta dynasty reigning in that country would necessarily bring with them juridical notions derived from Nilakanta, the author of the *Mayúkha*. The *Nirnaya Sindhu* also is clearly a Mahratta authority. The *Ratnamála*, a commentary upon this work, was supplied to the Advocate General by an official in Tanjore, and it is subject to the remark made upon the *Vaidhiya-Nirniyam*.

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We must also decline attaching the slightest weight to pundits' opinions. Fortunately the law which legalized them is now repealed, and we have now before us original materials collected with great industry and expense, and we are bound to exercise our own judgment upon them. No single circumstance has so polluted the administration of Hindú law as the influence of these pundits. Having books maintaining speculative opinions upon every subject, nothing is easier than the quotation of some book for almost every position, and, as we have seen in the present case, where the opinion of a Hindú sage was not to the purpose, it was altered to meet the necessity.

It has been strongly and ably put to us on the one side that we have frequently, as in the cases of Hindú wills, of the divisibility of property in Canara and of the right of a Bráhmin to adopt his sister's son, deviated from supposed principles, and that we have frequently overruled previous decisions. On the other it has been as forcibly said, that there is positive judicial authority affirming the widow's right to adopt without the consent of her deceased husband; that for more than 40 years this has been the understanding of the profession, and that it would be very mischievous to disturb what has so long been supposed settled. It appears to us that the course taken by this Court may properly differ, when itself the ultimate Court of appeal, from that which it should take when its decision is subject to revision. Sometimes on examining a supposed rule of law embalmed in a series of decisions it has been found to have no existence, and we have not hesitated to assist in overruling those decisions. Many instances of this have undoubtedly occurred. To have done otherwise would have been to fail in our duty to the public and the science of law. It may however well be that a Court ought, where its decision is subject to appeal, to follow even against its own judgment the decision of a co-ordinate Court. The reasons for the course taken in all the instances quoted by Mr. Mayne will show that they have no resemblance to the present.

The review now made, unfortunately at great but we trust not at inordinate length, will show that the Advocate General in his forcible and able appeal is scarcely well

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founded as to the mass of judicial authority which he supposed to exist in favor of the adoption. In the administration of Hindú law we are, it seems to us, peculiarly bound to look at the reason of the law and the analogies derivable, not fromother systems or modes of thought, but from such as we find in the system itself. In this respect we are only following the course observable in the administration of all systems of positive law. We are not at liberty as Judges to manufacture principles of law anomalous because inconsistent with those of the system into which we seek to introduce them, but we are bound to apply to new cases or circumstances existing principles, and to push them to their natural because logically derivable conclusions. It may be, indeed, that the principle so to be applied is itself an anomaly, inconsistent with the general body of the law but too firmly fixed by judicial decision to be now disturbed. Where this is so a Court may properly refuse to push it any further, but only because the extension is forbidden by other principles with which the anomaly is in conflict. The authorities of Hindú law lie before us as various strata before the geologist, widely differing in age although in close proximity. In the earliest of these writers, *Manu*; we find constant traces of doctrines in process of disappearance or already in conflict with those which were to take their place. We see the recognition of marriages between the various classes, always provided that the woman does not wed one of a class below her own, yet in conflict with this are passages which declare them to produce the deepest degradation. Manu himself wrote in the latter age and constantly implies that greater rigour of practice is necessary in an age of degeneracy.

Taking together Slokas 64 to 68 of Cap. IX, it is plain that a practice had prevailed before the time of Manu for women of the twice-born classes to have children raised by a brother or other near relation commissioned for the purpose. *Manu* repudiates this practice, except in the case mentioned in Sloka 69, but considers that it is still permissible with Sudras. It is impossible to reconcile this prohibition with subsequent parts of the same Chapter without the assumption, of what seems to be the case, that although *Manu* referring to an older standard reprobated this raising

of issue by commission, he was compelled to acknowledge that royal ordinance and example had legalized it. He was in fact upon this point a law reformer.

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The legal fiction of adoption was obviously not then of the importance which has since attached to it, and it is quite certain that in the days of *Manu* other modes of filiation were more common than this. It occupies a very subordinate place in *Manu*, and it is quite clear that there is no trace of the taking of the son by any other than him who affiliates. A distinction, moreover, seems to have existed between the son given, adopted and taken when abandoned. (Sl. 168, 169 and 171).

It is from these meagre materials that the whole theory of adoption has been evolved. Manu merely states that eleven sorts of sons are permitted as substitutes for the son of the body for the sake of preventing the failure of obsequies. The reason given shows that they were capable of offering the funeral cake to the ancestral manes, and were therefore sons to all intents and purposes by the theory of Hindú law.

We still find in the *Mitacshara* an enumeration of various sorts of sons, and among them is (Kshetraja) the wife's son, who is defined "as the child begotten by another person, namely, by a kinsman, (Sapinda) or brother of the husband." And although throughout this Chapter certain preference is shown to the legitimate son of the bosom, yet the right of inheritance is thus summed up in Section 33,—All without exception have a right of inheriting their father's estate for want of a preferable son. The same doctrine is enunciated by Nanda Pandita (Sl. 1, cl. 33), following the passage of Manu, but in perusing both his work and that of Devanda Bhatta (Datta Mim. 64, Datta Chan. 9) we find the doctrine that none but the legitimate sons and the sons given can be taken to be sons. Thus the practices which Manu and Yajnavalkya, writing in the Káli age, recognized as existing, these writers subsequent in date have declared to be not permitted on account of the deficiency of power of men of the then present age compared with that of the holy sages; not perhaps a very satisfactory reason but curious for its similarity to the reasons given by the reformers of all ages.

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Affiliation, however, is regarded by these writers as at least as necessary as it was regarded by Manu, and we should therefore be prepared to expect, as in other systems of law, that a doctrine although in itself obsolete has fructified and produced visible consequences upon existent law. The son *primâ facie* is he who is born of a man and his wedded wife. A legal fiction enabled him to regard many other sorts of sons as his, and among them was the son raised up to him by his kinsman or brother. The doctrine of the adoption of a given son recognized the exercise of will in taking to himself the son given as equivalent to the actual procreation of a son. Then his wife was with his permission permitted to take a son who should be the son of both of them. If adoption however was to supply the void left by the disappearance of all the other modes of filiation, it must provide for the case of procreation of children by others. Now the brother of the husband or Sapinda was the person entitled so to procreate, and, looking at the analogies derivable from the ancient law, the opinions of those writers who have admitted the assent of a Sapinda have only drawn from the nature of the subject-matter a perfectly logical inference. They would naturally be led to that conclusion by what is rather loosely called the policy of the law, but what should perhaps rather be called a principle of law so generally pervading it as to furnish in doubtful cases a proper principle of interpretation.

It seems to us, therefore, that in confirmation of an express decision, we have the authority of *Devanda Bhatta*, if true to his own principles, of *Vidya Narrainasawmy*, and of *Sri-Krishna*. On the other side is *Nanda Pandita*, who, however, in denying the power of the widow to adopt at all is opposed to the writers of all schools, and whose reasoning shows that he considers the giving and receiving upon the same footing. The weight of mere authority is clearly in favor of the capacity of the widow to adopt, and it seems to us that the authorities are entitled to respect, because their opinions are a logical deduction from the nature of the subject-matter; that the doctrine itself must have arisen if Hindú law, as found at its present stage of historical development, was to supply the place of those doctrines which had become obsolete, but which were themselves

fictions induced by the necessity of supplying by their aid a legal relation in the contemplation of Hindú law absolutely necessary.

Every system of positive law left to the natural process of historical development has largely used and must largely use such fictions. This unfortunately equivocal word has led many, as it led the illustrious Bentham, to imagine something dishonest lurking in this judicial process. As a distinguished modern Jurist says, "The most common object of these fictions has been the conduct of the transition from the rude and inflexible primitive Civil Law to a law more equitable and philosophical."(a) We may add that frequently too, as in the present case, such fictions are adopted to furnish a new mode of attaining an object still necessary, when the old modes of attaining it have either become ill-adapted to the changed public sentiment or from some other reason have disappeared. Moreover these purely intellectual abstractions when once juridically established, like concrete truths, become the legitimate parent of all legal consequences necessarily flowing from them.(a)

A wise because just policy has secured to the Hindús their own laws of inheritance, but this would become a boon of very questionable value if the law is to remain narrowed to the positive dogmas collectable from the text writers, and if its principles are not to receive that interpretation which must necessarily have followed from an unchecked development proceeding from the nature and origin of those principles. It was said at the bar that we could not reason from principles and practices which have become obsolete. A review of the authorities has shown that, as in all other cases, an obsolete principle of law has left its impress deeply upon the present law, and it is unquestionable that the present state of a law freely developed can never be understood without its past history. Looking at the reason for a positive rule of law, the proper principle of interpretation is to bring within the rule everything

(a) Ortolan Inst. I. 484. Le droit crée des personnes et des choses qui n'existent pas ; de même il crée en abstraction des faits purement imaginaires. C'est à dire que ces faits, quoique n'ayant aucune realité, sont établis intellectuellement et que les droits en sont déduits, comme s'ils avaient véritablement existé.

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which is manifestly within the reason. This was a rule of interpretation applied in the English law even to the unbending words of statutes, as we are told upon the high authority of Lord Coke (Heydon's Case, 3 Rep. 7, in Dwarris on Statutes, 563), and although the practice of modern times has been to narrow "the true reason of the remedy" to such reason as is collectable from the very words of the statute itself, there can be no question that this principle is properly and necessarily applied to judiciary law, and that the works of text writers far more nearly resemble judicial decisions than statutes. This subject is treated by Mr. Austin with his usual precision and analytical power, though to our great loss and misfortune a portion of this fruit of his noble mind has perished. On this principle of interpretation the authorities as to the nature of the assent required must be dealt with, and on this principle we must ourselves determine it, and should those authorities be inconsistent with the reason of the rule we ought not to hesitate to overrule them. On this principle too we must supply their omissions and derive the rule applicable to the present case, if they have not themselves expressly or have erroneously provided for it.

The pundits have in this case said that the consent of all the Sapindas of the husband of the late zamíndár must have been given to render the receiving of the boy a valid adoption. Their predecessors in 1814, equally without reasons, declared that the *woman's* relations were the persons to consent, and in the argument at the bar it has been strenuously urged for the appellants that there must be a unanimous assent, because all are equally related to the property of the deceased and equally likely to be prejudiced by the transaction. It is natural for Courts of Justice, and not unnatural for lawyers, to make the rights of property and the questions arising out of them of paramount importance. In a case in which many lofty sentiments of mortality were enunciated an amusing consciousness runs through the judgment of Lord Eldon that, but for the existence of an extensive property, the morals of Mr. Wellesley Pole's children would have remained unprotected. So doubtless in the present case the deceased Ramaswámy would have been left in the quiet possession of all spiritual benefits derivable from the

adoption if this extensive property had not been at stake. A moment's consideration will, however, show that the devolution of property is a mere incident, and that the question of the sonship to the deceased can in no way depend upon the title or absence of title of others to the reversion. As Ramasáwmy himself could have adopted a son without consulting his presumptive heirs, so a substituted adoption, whether valid or invalid, cannot be invalid on account of the infraction of supposed rights of property. The end being a spiritual end, and the temporal rights being a mere accessory, we shall find as might be expected that no trace of such an analogy is to be found in the text writers.

They all point to the necessity of the permission on account of the woman's dependence, being all alike based upon the exposition of the passage of *Vasishta*. The *Smriti Chandrica* speaks of the need of an independent male and does not seem to care who the male is, and in his later work (Sec. I, 31 and 32) *Devanda Bhatta* declares the power of a woman to give with her husband's permission if he is present and without it, if he be dead, have emigrated, or entered a religious order. As has been before shown, the passage of *Vasishta* must receive the same interpretation as to giving and receiving, as was clearly the opinion of *Nanda Pandita*. Then in the next section is a rule of interpretation very common in the Hindú law, that where there is no absolute prohibition there is assent, and in the conclusion of the section he considers that by the use of the disjunctive, "He whom his father or mother gives," *Yajnavalkya* intended to suggest the independence of the woman. *Vidya Narrainasawmy* construes the text of *Yajnavalkya* in the same manner, and, after laying down in distinct terms the necessity for an adoption, says that it must be with the assent of the father. Looking at the whole course of his reasoning that this sort of adoption was a substitute for the begetting, and at the fact that he has stated that the begetting must be with the consent of the father, &c., there can exist little doubt that he would have applied the &c. to the case of adoption. It would be wholly contrary to the reasoning of Hindú writers to make a process declared to be so imperative depend upon the existence of any particular person. Mr. Ellis has justly remarked that the genius of Hindú law

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allows substitution in almost every conceivable case. *Sri Ráma Pandita* inculcates merely the paramount necessity of an adoption in the present age by the widow.

Although we have denied to the authors of other schools the title of authorities for the purpose of settling the actual state at which law had arrived in the Madras school, when it is once established, as we think it is, that the same rule prevails in another school, and that it has grown out of precisely the same reasons, it becomes important to see how these authors have developed and applied the rule, because Hindu logic and modes of thought would have been applied to it if the natural development of the body of law had continued unchecked by foreign influences. The author of the *Datta Kaustubha* reasons thus:—The guardianship described to exist is merely intended to provide, as that of the father before marriage was, against the performance of improper acts, but seeing that the act of adoption is one plainly enjoyed and obligatory, no dissent of kinsmen can prevent the widow from doing it, and their assent is not needed. That adoption is upon the footing of other spiritual duties for which she does not require permission and which no dissent of guardians could prevent her from performing or justify her in not performing. This doctrine is curiously consistent with that of *Devanda Bhatta*, and surely the giving of a son is a matter of at least as much consequence as the receiving of one, for the spiritual interests of the living husband may be imperilled by the giving; the receiving, if it can do no good, can at least do no harm. So far, therefore, as the weight of authority goes, there is no foundation for the doctrine that the assent of all the Sapindas is necessary. Founded as the doctrine clearly is upon the old principle of actual begetting by a brother or a Sapinda, it would be strange if it were so. The assent required in that case was that of the spiritual director, and when for the joint act of the brother or Sapinda and the widow was substituted the act of the widow alone, analogy would seem to show that an adoption by the widow under religious sanction would suffice. If, however, it is thought that the will of the Sapinda, his act being no longer permitted, should go with the act of the widow, it would be wholly contrary to analogy to maintain that the whole

of the Sapindas must assent, for there can be no color for saying that all of them could or ought to have joined in the act of begetting. The authorities which declare the assent necessary are, as has been seen, very indeterminate; the passage of *Vidya Narrainasawmy* is obviously elliptical and that of *Sri Rama* gives no directions upon the subject.

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In applying, therefore, this mode of exposition to a rule of law so clearly wanting in fulness of expression we have merely followed the precept of the great master, *Savigny* (Sys. § 35). After pointing out that the three modes of construing a law indeterminately expressed are, (1) The examination of the whole legislation upon that matter. (2) The reconciliation of the law with its motives. (3) The consideration of the results obtained, he says of the second process, that which we have employed, "*A defective law is interpreted by its motives, but this mode of interpretation is subject to more restrictions than the preceding;*" and after declaring this process generally applicable to a law defectively but rarely to a law erroneously expressed, he says (§ 36), "*In the second place we must consult the motive of the law and if possible the special motive having a direct affinity with the object matter of the law, and in the absence of a special motive only we must have recourse to the general motive as a subsidiary means.*" Here we have before us the general motive of the law and the special purpose of it, and they both lead us to the conclusion to which its historical origin irresistibly points. Moreover, the illustrious author is dealing with the interpretation of the language of the legislature declaring a law by force of its supreme will, and we have shown that the reason of the law is still more imperatively our guide where we are interpreting what is rather judiciary than statutory law.

On the reason of the rule, then, it seems to us that if the requirement of consent is more than a moral precept, and it must never be forgotten that in all Hindú authors as in the works of all authors who expound a system of positive law professing to be based upon divine revelation, ethical and jural notions are inextricably intermixed, the assent of any one of the Sapindas will suffice. If, however, the Sapindas are by a fanciful rather than a solid analogy to be treated as a juridical person in which the whole

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authority of the husband is vested, it would be wholly contrary to sound jurisprudence to treat the assent of every individual member as necessary. On the contrary the will of the majority of individual members must (*Sav. Trait.*) be taken as the will the body in any matter not manifestly repugnant to the purpose for which the body was created. That the purpose here to be effected is not repugnant to the purpose of the institution, if such there be, there can exist no doubt.

It only remains to deal with the evidence as to the nature of the assent given.

This on our view of the law would not be necessary, it being clearly established for the purposes of this cause that not only some of the Sapindas but a majority of them gave their assent. This has scarcely been disputed, and we only state our conclusions upon the evidence, because it will be more convenient to the tribunal which will no doubt ultimately have the disposal of this case.

The Civil Judge has found that Muttu Virayi assented to the act done. This is really as it appears to us a matter of no consequence. We see no reason for dissenting from his conclusion, but it is quite manifest that a woman herself dependent could not supply the want of independence upon the part of the wife.

It cannot be denied that the evidence on both sides is rather loose as to the pedigree, but we can find no solid reason for dissenting from the conclusion of the Civil Judge that the evidence for the plaintiff as to that pedigree is entitled to more weight than that for the defence. We should have come more confidently and with more satisfaction to this conclusion, were it not clear to us from the observations of counsel on both sides that the witnesses for the defence were somewhat roughly treated in the Court below, and that the Court seems unnecessarily to have aggravated instead of alleviating the pressure put by hostile counsel, perhaps over-valiant for his clients, upon them. We must, however, deal with oral evidence in the only way in which an Appellate Court can safely deal with it, dissenting from the conclusion of the tribunal which saw the witnesses in cases only which have circumstances themselves grossly

improbable or facts which create unmistakable inferences inconsistent with the credibility of those whom the lower Court has believed. Oral evidence is *primâ facie* not entitled to believe, and in this country where in a Civil cause we say that we believe, our meaning can only be that, being compelled to come to a conclusion, it is more reasonable to come to one than another.

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In like manner and on the same reasoning we are unable to say that Ram Rajah was not present at the adoption and did not assent to it. If one whose assent to an act enjoined by the law was required, wilfully and with no better reasons than those given, refused to accord it, a very nice question would arise whether that dissent without reasons could have any effect whatever. It is unnecessary, however, to pursue this point, for we think that we cannot but conclude that the assent was actually given.

The case of Sivaswámy is the only one which remains. It is clear that he was not present; whether his mere absence without it being shown that the absence was owing to dissent could have any effect whatever is very doubtful. It was alleged that he was a minor, and his admissions when in litigation with the Zemindar were quoted to show this. It is quite clear, however, that if those admissions were much more unequivocal than they are, they could not prove the fact against the parties to this cause. It must be taken therefore that he did not at the time assent. It is clear, however, that he gave a subsequent assent, if such assent would avail. To assume that it would not would be to treat an adoption as a solemnity and this present assent as absolutely indispensable to its validity. We do not think that this is a reasonable view. The essence of the transaction is the giving and receiving. To render that giving and receiving a valid adoption some contend that the assent of certain persons is necessary. We are unable to see the least reason for contending that a principle[a] which is to be found in the law of all countries does not properly apply to the Hindú Law, particularly when we find in favoured transactions such as this the constant recurrence of the maxim that

(a) Si consensus non statim ab initio initi negotii sed postea demum declaratur dicitur ratihibitio, cui eadem ac consensui praecedenti vis in esse solet.

1864. November 17. R. A. No. 85 of 1861 and R. A. No. 49 of 1861.

the absence of positive dissent shall be taken as assent. This goes much further than other systems of which the maxim is generally "*Qui tacet non utique fatetur: sed tamen verum est, eum non negare.*"

We should not therefore have thought it necessary to notice this matter, as we consider it free from doubt, if it had not been for an extra-judicial remark of Lord Kingsdown (then Mr. Pemberton Leigh) at page 103 of Vol. IV of Moore's Indian Appeals. The Privy Council there ruled the adoption to be in its essence altogether invalid, and this is a material distinction between that case and the present. That an assent given upon the mistake of fact should be powerless to set up the transaction was only natural.

We must briefly notice the argument that the intention was to adopt to the widow herself and not to the husband. We think this argument not sustainable upon the language of the letters. She refers to her husband's directions which have not now been put forward. Moreover, if she had said nothing about her husband, we should have been unable to come to any other conclusion than that she intended to adopt to herself and her deceased husband.

Our conclusions are:—

That the widow of the late Zemindar has made a valid adoption; that she made it with the assent of the majoriy of her husband's Sapindas we entertain no doubt; that, though not without doubt, we are unable to say that the Civil Judge is wrong in thinking that all the Sapindas now living have been proved to have assented. We ought perhaps to remark that in the Court below as well as in appeal there was, as apparently there could be, no dispute that a ceremony took place which, if the widow was capable of making one, constituted a valid adoption. We are unable, however, to understand why counsel were stopped by the lower Court when questioning the witnesses as to the circumstances of the ceremony. It might be true, as no doubt it was true, that the whole case was conducted by the parties, as it has been in appeal, in a manner which before a jury would have entitled and compelled the jury to come to the conclusion that all essentials of a valid ceremony had taken place, and a Court which is

in this country judge both of law and fact must of course do the same. It was, however, clearly open to counsel to test the memory of the witnesses as to the transaction, because the failure to remember or the discrepancy between their memories would be the proper foundation of an argument that they could not be speaking truly. No objection was made upon this point in appeal, and we have noticed it only because it would furnish a specious though in this case unfounded argument, that the adoption being nowhere expressly admitted upon the record, this interference of the Court improperly prejudiced the case of the appellants.

1864. *November* 17. *R. A. No.* 35 *of* 1861 *and R. A. No.* 49 *of* 1861.

On the question of maintenance we are inclined, looking at the extensive property, and to the fact that the claimant is the last surviving widow of the Zemindar, to make a somewhat more liberal allowance. While it must not be forgotten that a Hindú widow ought steadily to eschew pomp and show, we think that Rupees 10,000 per annum will not be a sum at all excessive, while quite adequate to the real wants of the widow and to all expenses which she can reasonably incur.

On the question of costs we are not inclined in the circumstances of the case to make any order. The question is one undoubtedly of considerable difficulty which might very fairly be raised. The authorities were by no means clear, and we dismiss the appeals, subject to the modification stated, without costs.

Appeals dismissed.

Appellate Jurisdiction.(a)

Special Appeal No. 300 *of* 1864.

KUTA BULLY VIRAYA..........................*Appellant.*
KUTA CHUDAPPAVUTHAMULU.............*Respondent.*

Where a division has taken place amongst the members of a Hindú family one of whom is a minor, the circumstance that the father and minor continue to live together, and their shares become mixed, does not conclusively constitute a state of reunion between the father and the minor, but is evidentiary matter only to prove the reunion.

THIS was a special appeal against the decree of the Acting Principal Sadr Amín of Rajahmundry, confirming the decree of the District Munsif of Amalapuram, in Original Suit No. 137 of 1862.

1864. *November* 19. *S. A. No.* 300 *of* 1864.

(a) Present: Frere and Holloway, J. J.

1864.
November 19.
S. A. No. 300
of 1864.

The original suit was instituted by the respondent to recover 4 acres and 32½ seers of inám lands from Koota Surama his mother, and the appellant his brother. The plaintiff filed a karárnáma sanad executed by the first defendant in that suit under which he claimed. The first defendant denied the execution of the karárnáma, and claimed a life interest in the property. The second defendant (the present appellant) in his answer claimed that the property belonged to him, and stated that the plaintiff had divided with his father long before the execution of the karárnáma and lived separately. Second defendant further stated that the plaintiff executed a fárikhat, or deed of release, relinquishing all claims upon his father; that on the death of his father, he, the second defendant, inherited all his father's property, which remained in the possession of the first defendant who had acted as his guardian during minority; that upon his attaining his majority, the first defendant separated from him on receiving an allowance for maintenance; and that the first defendant had no right to execute the karárnáma. The decree of the District Munsif was in favor of the plaintiff, the present respondent, and the Munsif found that after the second defendant had attained his majority he executed a fárikhat to his mother releasing all claim to the patrimonial property then in her possession which included the lands in dispute, and that the second defendant received all that he was entitled to.

Sloan, for the appellant. The appellant being a minor when the division between his father and the respondent took place was not bound by it, and he could not have divided with his father. [HOLLOWAY, J.:—The act of a minor is never more than voidable.] He was not bound by it, and he had no power to execute the fárikhat. [HOLLOWAY, J.:—He ratified the division after he attained his majority.] Suppose a division had taken place with the appellant, the fact of the father having subsequently retained both shares within his power and control constituted a re-union. [HOLLOWAY, J.:—It was evidentiary matter.] He referred to the Mitacshara[(a)] and contended that there was a re-union in this case—the father having retained in his hands the whole property of the younger son. [HOLLOWAY, J.:—The force and efficacy

(a) Mitac., Sec. 9, Clauses 1 to 4, pp. 356, 357.

of an act depend upon the intention with which it is done. Suppose two persons become divided, and after division they let a tenement as joint termors to a tenant, do you say that, the instant they so act all their property becomes re-united ?]

The appellant was heir if there was no division. If there was a division there was a re-union, and he was then heir also. As to the ratification, he submitted that was obtained by undue influence. [HOLLOWAY, J.:—The Court finds there was no compulsion at all.] The first defendant was the guardian, and the ratification was obtained immediately after the second defendant attained his majority. The acts of guardians under such circumstances were regarded with suspicion. The second defendant should have been told all the facts[a]. [HOLLOWAY, J., referred to *Stewart* v. *Stewart*[b]. If there was any mistake here, it was a mistake as to the legal rights. Without saying that in no case will a Court of Equity give relief in cases arising out of ignorance of law, it was certain that the Courts were very reluctant to do so.]

Before the release could be upheld it was necessary to shew that the ward had been put in full possession of all the material facts of the case. The burden of proof was upon the respondent, but the Court below threw the onus upon the appellant.

PER CURIAM:—There is no doubt in this case. The property of the second defendant was mixed with that of his father after the division, but it does not follow that there was a re-union. To say that their shares were mixed together in the sense of making them one is begging the question. We must see what is the principle of law, and what is the weight of evidence. To say that, because a minor son lives with his father after a division has taken place, a re-union is conclusively established is what cannot be admitted; such a state of things is only evidence of a re-union. Passages abound in the writings of Hindú lawyers in which this distinction seems not to have been borne in mind, and the passage quoted from the *Mitacshara* is of this character.

With respect to the undue influence said to have been exercised, this is the case of a man entering into an agree-

(a) 1 Story, Ep. Jur. 126. (b) 6 C. & Fin. 911.

1864. November 19. S. A. No. 309 of 1864.

ment for a valuable consideration. There is a distinct finding that he received all that he was entitled to. That question is not now before us. Whether he did so or not is a question of fact, and that fact has been found clearly by two Courts against the appellant. The appeal must be dismissed with costs.

Appeal dismissed.

Appellate Jurisdiction.[a]

Special Appeal No. 323 *of* 1864.

RA'MANA'THA MUDALI and others............*Appellants.*
VAITHALINGA MUDALI......................*Respondent.*

The statute of limitations, if relied upon as a ground of defence, should be pleaded in every case in the Original Court.

The principle of the decision in Special Appeal No. 417 of 1862 will not be extended.

1864. November 19. S. A. No. 323 of 1864.

THIS was a special appeal against the decree of R. G. Clarke, the Civil Judge of Tranquebar, confirming the decision of the Principal Sadr Amín of Negapatam, in Original Suit No. 38 of 1862. The original suit was instituted by the plaintiff for the recovery of Rupees 16,000, being the principal and interest due on a settlement of accounts by the first defendant, the undivided brother of the second and third defendants, to the plaintiff's late brother, on the 30th August 1853. The first defendant, in his answer, admitted the settlement, but set up another settlement of account, in respect of a subsequent transaction, between himself and plaintiff's brother, which was written by the plaintiff himself, by which the plaintiff's claim was satisfied. The Principal Sadr Amín found that the plea was false, and gave judgment for the plaintiff against the first defendant. The decision was confirmed upon regular appeal. The second defendant now presented a special appeal relying, for the first time, upon the Act of Limitations, Act XIV of 1859, Sec. 1, Clauses 9 and 10.

Branson, for the appellant, referred to *Special Appeal No.* 417 *of* 1862[b], to shew that the Statute of Limitations could be set up for the first time on special

(a) Present: Frere and Holloway, J. J.

(b) Mad. H. C. R. 358.

1864. November 19. S. A. No. 19 of 1864.

appeal. [HOLLOWAY, J :—It was open to defendant to plead the Statute of Limitations in the Court below.] It certainly was, but he submitted it was open to him to set up the statute now. [HOLLOWAY, J :—I have objected to the decision over and over again. But it does not go the length which is contended. The words of the Court are that the statute cannot for the first time be set up on special appeal "unless the facts which raise the plea and appear in the case are admitted by the plaintiff."] The suit was brought upon an account settled with plaintiff's brother in 1853, and it was not stated that there was any other ground upon which the plaintiff had a right of action.

HOLLOWAY, J. :—We entertain no doubt whatever in this case. The decision in *Special Appeal No.* 417 *of* 1862 introduced new law, and we are not willing to carry the principle farther than the actual words in that case require. In this case it cannot be said that the facts which raise the plea are. admitted by the plaintiff. Mr. Branson's argument allows that this is so, for he asked us to draw an inference from the facts admitted by the plaintiff. We are not prepared to push that which is in itself a legal anomaly one step further than the extent to which the present decisions carry it. If the Statute of Limitations is relied on it ought to be pleaded in every case. I may add that in the case in Moore's Indian Appeals(a) referred to in support of the decision of this Court cited on the part of the present appellant, there were no pleadings in the Court below. It was an irregular investigation conducted without any pleadings at all, and therefore the party had no opportunity of pleading the law of limitation until the case came before the Privy Council. This is expressly stated by Baron Parke, in his judgment in the case. We are of opinion that this appeal ought to be dismissed.

Appeal dismissed.

(a) *Maharajah Dheeraj Raja Mahalab Chund Bahadoor* v. *The Bengal Government*, 4 Moore's I. A. C., 466, 508.

Appellate Jurisdiction.(a)

Criminal Petition No. 122 *of* 1864.

Ex parte Nellikel Edatthil Itti Pungy Achen.

The report of a Subordinate Magistrate is such "credible information," within the meaning of Sec. 282 of the Code of Criminal Procedure, as to authorise a Magistrate to summon an individual named in the report and require him to enter into a recognizance to keep the peace, although the report does not suggest that a recognizance should be required, but suggests other means for the prevention of disputes and the preservation of order.

1864. *November* 21. *C. P. No.* 122 *of* 1864.

THE petitioner in this case petitioned against an order made by the Head Assistant Magistrate of Malabar, directing the petitioner to furnish security to the extent of Rupees 1,000, himself to enter into a recognizance of Rupees 500, and two sureties in Rupees 250 each, to keep the peace for the period of one year, which order was affirmed by the Session Court of Calicut, on the 29th of August 1864.

The order of the Head Assistant Magistrate of Malabar was grounded upon a report made by the Sub-Magistrate of Allatur, dated 18th March 1864. The Sub-Magistrate stated that disputes had arisen between the inhabitants of Pandashi Deshom regarding the right of performing the Thrikurumba Kovil ceremony, and they had for the last three years formed themselves into hostile factions and had each year obstructed the performance of the ceremony by causing disturbance; that Nellikel Edatthil Itti Pungy Achen was an influential member of one of the factions, and that the Sub-Magistrate had fined him 50 Rupees for an assault committed this year upon one of the opposite faction. The Sub-Magistrate added that the ill-feeling was increasing and likely to increase, and he expressed his opinion that a final order ought to be passed to the effect that the ceremony ought to be performed by all the parties agreeing together, or by determining the right by a civil suit, and that such an order would bring the existing contentions to an end.

Mayne, for the petitioner. The Head Assistant Magistrate had no power to make the order. The Sub-Magistrate

(a) Present: Scotland, C, J., and Frere, J.

1864. November 21. C. P. No. 122 of 1864.

is not himself authorized to require securities, and his report was written, not for the purpose of having the petitioner bound over to keep the peace, but for the purpose of procuring an order to regulate the performance of the ceremony in the pagoda. If, upon conviction for the assault, the Sub-Magistrate had reported to the Head Assistant Magistrate that it was necessary to require securities, the Head Assistant would have been empowered to make the order under Sec. 280 of the Code of Criminal Procedure. But the conviction was sometime antecedent to the report, so that the report is not a report under Section 280, having been made for a different purpose.

[SCOTLAND, C. J :—Was your client summoned to appear and show cause before the Assistant Magistrate before this order was made ?]

Mayne. Yes. [SCOTLAND, C. J., referred to Sec. 282 of the Code of Criminal Procedure[a]]. What is meant by " credible information" in Sec. 282 is the ordinary information made by a person who pledges himself to a personal knowledge of the facts which he states. It cannot mean a statement of this kind in a letter to a Magistrate which is not addressed to the Magistrate for the purpose of inducing or asking him to take this step, but for the purpose of his taking an entirely different step.

[SCOTLAND, C. J :—The party is entitled to have full opportunity of answering and showing cause before any recognizance can be ordered to be given. Look at Sec. 285 of the Code of Criminal Procedure.]

I submit that the information must be laid before the Magistrate for the purpose of inducing him to take the step which he ultimately does take.

SCOTLAND, C. J :—If the question had rested on Sec. 280 alone, Mr. Mayne's objection would perhaps have been well founded. When a party is required under that Section

(a) Section 282 is as follows :—It shall be lawful for the Magistrate of the district or other officer exercising the powers of a Magistrate whenever he shall receive credible information that any person, whether a European British Subject or not, is likely to commit a breach of the peace, to summon such person to attend at a time and place mentioned in the summons to show cause why he should not be required to enter into a bond to keep the peace with or without sureties as such Magistrate shall think fit.

1864. November 21. C. P. No. 122 of 1864.

to give a recognizance to keep the peace, the decision should be come to upon a report made by the Sub-Magistrate forthwith upon his conviction. That does not appear to be the state of facts in this case. On the contrary, the conviction takes place sometime before the report of the Subordinate Magistrate is made. But it appears that the Head Assistant Magistrate issued a summons calling upon the party to show cause why he should not enter into a recognizance. And we must take it now that the petitioner appeared and showed cause, and that the Magistrate considered that he failed to show sufficient cause. The question is whether the Magistrate was justified in summoning the petitioner and requiring him to enter into the recognizance under Section 282 : in other words whether the report of the Subordinate Magistrate amounted to "credible information?" Considering Section 282, with the provision in the latter part of Section 280, I should be of opinion that it did, but Section 285 removes all doubt. That Section provides that the report of a Police Officer "or other credible information" is sufficient to authorise the Magistrate to act in the manner pointed out by that Section, and shows, I think, that the report of a Subordinate Magistrate must be treated as "credible information" within the meaning of Section 282. It does not appear, then, that the Magistrate had not jurisdiction in this case, and consequently we cannot interfere.

FRERE, J., concurred.

Petition dismissed.

Appellate Jurisdiction[a]

Referred Case No. 17 *of* 1864.

PICHAKUTTY MUDALI *against* NA'RA'YANAPPA AIYAN.

In a written agreement the defendant, in consideration of a sum of money received by him, promised to obtain a more favourable assessment upon certain villages in respect of waste and cultivable lands, and in case of failure to re-pay the amount received. In a suit to recover the amount paid to the defendant.

Held that the contract was not vitiated by reason of illegality.

Aliter if it appeared upon the face of the plaint, or if it were established by evidence independently of the written agreement, that the arrangement was that the defendant should use corrupt or illegal means or improperly exercise any personal influence which he possessed or professed to possess over a public servant.

1864. November 21. R. C. No. 17 of 1864.

THIS case was referred for the opinion of the High Court by T. Rangaswámy, the Principal Sadr Amín of Tanjore, in Small Cause Suit No. 359 of 1864.

The suit was brought to recover Rupees 490-8-0, being the amount received under an agreement, dated the 11th June 1859, by the defendant from plaintiff, in consideration of rendering assistance in the Collector's Office in a matter of dispute connected with the villages attached to Mínmisal Chattram to which the plaintiff and several others are Parakudis, the defendant having failed to fulfil his part of the contract.

The agreement, marked A, signed by the plaintiff and defendant, was as follows :—" Account passed to Pichakutty Mudali of Alathur, by Náráyanappa Aiyan Nattu Agile (general agent of the villages) 11th June 1859. Out of the subscription of Rupees 2,000 agreed to be raised in an assembly of the villagers for the purpose of advocating their cause with regard to the waste land and price of paddy without any prejudice either to the ryots or to the charitable endowment, I have received Rupees 552. As this sum is with me I shall as agreed to in the villages accomplish the task and receive the remainder of the amount, and also Rupees 1,000 for any further expense which shall have been incurred. Should I fail to do so I shall re-pay Rupees 472, after deducting Rupees 80, the arrears of my salary and receive back this account. Signed Náráyanappa Aiyan."

(a) Present : Scotland, C. J., and Frere, J.

1864. November 21. R. C. No. 17 of 1864.

It also appeared that the defendant had been employed previous to June 1859, by the Parakudis who rented the villages as their representative or agent for the village affairs at a fixed monthly salary.

The defendant pleaded that he had performed his part of the agreement.

The Principal Sadr Amín dismissed the plaintiff's suit, being of opinion that the sum claimed was paid upon an agreement (to obtain official favour) which was tainted with illegality and could not be enforced, subject to the opinion of the High Court upon the following questions : 1. Whether the consideration for the money claimed under the agreement marked A, namely, defendant's promise to get a remission on waste land or favourable settlement of rent from the Sarkar is such as the defendant has power by law to perform. 2. Whether an action can be maintained by the plaintiff under the above agreement for the breach of the said promise by the defendant.

The parties were not represented by Counsel.

The Court delivered the following

JUDGMENT :—The plaintiff in this case sought to recover Rupees 490-8-0 being part of a sum paid under an agreement to the defendant on condition of his performing certain acts, but which the plaintiff alleges him to have failed to perform.

The Principal Sadr Amín has reserved two questions for our decision, viz. : I. Was the consideration for the agreement A such as the defendant had power lawfully to perform ?

II. Can an action be maintained against the defendant for breach of the contract ?

Both the questions submitted depend upon the precise nature of the arrangement entered into by the defendant, and to ascertain this we must, as the case is stated, look to the terms of the written agreement without regard to the contradictory verbal statements of the plaintiff and defendant in the suit. We understand from the case that, at the date of the agreement, the defendant was not employed in any public office, but stood simply in the relation of general agent to the plaintiff and the other Parakudi tenants of the villages referred to in the agreement; and that the

1864. November 21. R. C. No. 17 of 1864.

plaintiff and the other tenants, being dissatisfied with the assessment made upon the villages in respect to both the waste and the cultivable lands, entered into the agreement with the view of obtaining, through the defendant's special agency, a more favourable assessment. The point, then, for consideration is, did the defendant for that purpose undertake in consideration of the stipulated sum to induce by corrupt or illegal means, or by the exercise of personal influence, any public servant to do an official act or show any favour? If he did not the contract cannot be treated as illegal; and we are of opinion that the written agreement does not properly admit of such a construction.

The agreement, no doubt, clearly refers to benefits to be obtained through the Collector's Office; but there is nothing in it to show an understanding between the parties that the defendant was to have recourse to corrupt or illegal means of any kind, or that he would use personal influence which he professed to possess with any public servant. In substance, the agreement cannot fairly be said to amount to more than this, that the defendant undertook the task of preparing and presenting before the Collector the case of the Parakudi tenants, and successfully urging their claim to a fair alteration of the assessments upon the villages; and that, in the event of failure to accomplish the task, the defendant would make the re-payment expressed in the agreement. For these reasons we think the contract between the parties, so far as it appears from the written agreement, was not vitiated by reason of illegality, and that the plaintiff might maintain a suit for a breach of it. Whether he is entitled to succeed, when the whole of the evidence in the case is considered, is a question which the Principal Sadr Amín must be left to decide.

We think it right to add that, if it had appeared upon the face of the plaint, or if, upon a question raised between the parties in the suit, it were proved by evidence independently of the written agreement, that the arrangement was that the defendant should, for the stipulated sum, use corrupt or illegal means, or improperly exercise any personal influence which he possessed or professed to possess over a public servant, the right to recover back the money paid would be affected by the illegality of the transaction.

Original Jurisdiction.(a)

Special Case No. 49.

P. VALU MUDALI.........................*Plaintiff.*
W. SOWERBY.........................*Defendant.*

A Memberof the Church of England is not exempt by law from taking an oath in a Court of Justice in India, although he may entertain sincere objections against taking an oath on the Bible and is willing to make an affirmation binding upon his conscience.

The English Statute 17 and 18 Vic., cap. 125, does not apply to India.

1864. *November* 22. *S. C. No.* 49.

CASE referred by L. U. Steele, First Judge of the Madras Small Cause Court.

The action was brought by the plaintiff, a proprietor of an hotel, to recover Rupees 297-14-0 for boarding and lodging defendant and his family for the month of August of the present year.

The defendant admitted he owed Rupees 274-2-0; but denied his liability as to the difference, Rupees 23-12-0.

The defendant was tendered as a witness on his own behalf, but he refused to be sworn.

In reply to questions put by me, he said, "I refuse to be sworn on the ground of having conscientious objections to taking an oath. I believe it is not right to take an oath on the Bible. I am not a Quaker, Moravian or Separatist. I am and have been always a Member of the Church of England. I believe in the tenets of the Protestant religion. I am willing to make an affirmation which would be binding on my conscience."

I refused to receive his evidence as he would not give it on oath. I may say that I am satisfied of the sincerity of the defendant's objection to being sworn.

I gave judgment for the plaintiff contingent upon the opinion of the Honorable the Judges of the High Court on the following question:—Had I power to receive the defendant's evidence on solemn affirmation instead of on oath under the circumstances disclosed?

Miller, for the plaintiff.

(a) Present: Scotland, C. J., and Bittlestone, J.

The Court delivered the following 1864. November 22. S. C. No. 49.

JUDGMENT :—We are of opinion that the decree of the learned Judge was right, and that he had no authority to receive the evidence except upon oath. Section 47 of Act IX of 1850, expressly requires that in the Madras Court of Small Causes "every person shall be examined on oath, or, *when exempt by law from taking an oath* in any Court of Justice, on solemn affirmation ; and the question, therefore, is whether the defendant is exempt by law from taking an oath in a Court of Justice ? The only legislative provision which would apply to such a case as this is the Stat. 17 and 18 Vic., cap. 125, Sec. 20, but the operation of that section is expressly confined to Civil Courts in England and Ireland (see Sec. 103) and no subsequent Act either of the English or Indian legislature has extended it to the Courts of this country.

Appellate Jurisdiction.(a)

Criminal Petition No. 116 *of* 1864.

Ex parte KAPALAVAYA SARAYA.

A settlement of accounts in writing, though not signed by any person, is a "valuable security" within the definition of Sec. 30 of the Indian Penal Code.

THE petitioner was charged with having destroyed a valuable security before the Session Judge of Rajahmundry, and sentenced to two years' imprisonment under Section 30 of the Indian Penal Code. The valuable security was a settlement of accounts in the hand-writing of the prisoner, though not signed by him. 1864. November 26. C. P. No. 116 of 1864.

Sloan, for the petitioner. Section 30 of the Indian Penal Code was as follows :—"The words 'valuable security' denote a document which is, or purports to be, a document whereby any legal right is created, extended, transferred, restricted, extinguished or released, or whereby any person acknowledges that he lies under legal liability, or has not a certain legal right." He contended that a settlement of account was not a valuable security in the terms of

(a) Present : Phillips and Holloway, J.J.

1864. November 26. C. P. No. 116 of 1864.

the section. There was no direct promise to pay, and nothing appeared on the face of the instrument itself whereby any legal right or liability was created. [HOLLOWAY, J :—What is meant by the words " or purports to be" used in that section ?] The instrument should contain a direct promise to pay, or should purport to create an obligation on the face of it. Otherwise the word " whereby" did not apply. He referred to *Cowper* v. *Lord Cowper*(a).

HOLLOWAY, J :—In this case there is evidence that a certain document was torn up by the prisoner. There were three persons present when it was torn and they all swear to it. In order to determine what the nature of the document was, there is only the evidence of the prosecutor, but that case is materially fortified by the act of the prisoner which showed how important he thought it to get the document out of the way. There is also evidence that the document was in the hand-writing of the prisoner. With reference to the argument that this is not a valuable security because it does not contain a promise to pay, we do not think it ought to prevail. The document did not convey any right itself. It merely evidences an obligation upon which the right follows. When A and B settle accounts and a balance is found due what is the meaning of that ? It is a distinct acknowledgment of an obligation to pay the sum so found due. I entertain no doubt that an account stated in which a balance is admitted to be due in the hand-writing of the prisoner is a valuable security.

PHILLIPS, J., concurred.

Petition dismissed.

(a) 2 Piere Williams, 720.

Appellate Jurisdiction.(a)

Special Appeal No. 447 *of* 1863.

A. SESHAIYA..................................*Appellant.*
K. KANDAIYA.............................*Respondent.*

A defendant may plead the joint fraud of himself and the plaintiff as a bar to an action upon a contract which the plaintiff seeks to enforce by suit.

The distinction between acts voidable by Statute and at Common law discussed.

THIS was a review petition praying the Court to reconsider the decision in Special Appeal No. 447 of 1864, dismissing the appeal. The special appeal was against the decree of F. S. Child, the Civil Judge of Cuddapah, confirming the decision of the District Munsif of Duvúr, in Original Suit No. 506 of 1859. The plaintiff in the original suit sued to recover a house valued at 400 rupees, and 48 rupees for two years' rent at 24 rupees per annum. The plaintiff's case was that the defendant received from the plaintiff's father 400 Rupees on the 2nd May 1847, and gave possession of the house as per bill of sale executed for the same, and that the defendant subsequently became tenant of the house, and while living therein executed a deed of rent to the plaintiff's father on 13th August 1847, but the defendant subsequently discontinued to pay rent and declined to quit the house. The defendant, in his answer, admitted the execution of the bill of sale, but he alleged that he did not receive the consideration therein mentioned; that being afraid that a suit would be instituted against him for defamation of character, and that his property would be taken in execution, he clandestinely executed this document to the plaintiff's father, and that on the same day the plaintiff's father executed a document to him undertaking to return the bill of sale. The defendant denied that he executed the deed of rent mentioned by the plaintiff, or that he paid rent, and he stated that after the execution of the bill of sale the house came into his possession. The District Munsif decreed that the defendant do give up the house and pay 48 rupees on account of rent together with the costs of the suit. On regular appeal the decision was confirmed. The Civil

1864. *November* 26.
S. A. No. 447 *of* 1863.

(a) Present: Frere and Holloway, J. J.

1864. November 26. S. A. No. 447. of 1863

Judge's judgment was as follows:—"It is unnecessary to go further into this case than simply to observe that by the appellant's own shewing his appeal must be dismissed, for he alleges in his original answer that it is quite true that he gave the plaintiff a sale deed for his house with a view to defraud one who he supposed was about to sue him for damages. If the defendant did make over his property to the plaintiff, he must now take the consequences." There was no finding as to the alleged rent agreement. Upon special appeal, the decision of the Civil Judge was confirmed.

The Advocate General, for the petitioner, the defendant.

Mayne, for the plaintiff.

The Court, having taken time to consider, delivered the following

JUDGMENT:—The original suit was brought to recover a house which defendant is alleged to have sold to plaintiff's father in the year 1847 and to have subsequently occupied as the tenant of that house.

The defendant answered that he received no consideration for the document, that it was really executed for the purpose of securing the house against attachment on account of a suit which he apprehended, and that he never executed the document acknowledging tenancy and agreeing to pay rent.

At the original hearing this case was hurriedly and improperly disposed of. We of course did not agree with the Civil Judge that the defendant could not be allowed to plead his own fraud and that of the plaintiff, but we were under the impression that there was an absolute finding, that the relation of landlord and tenant had been found to exist between the parties. Whatever was found by the Munsif it is quite clear that there was no finding upon the matter by the Civil Judge, and notice was, therefore, given to the plaintiff of an application for review of judgment.

Mr. Mayne, at the last sitting of the Court, shewed cause against that review. His argument was that the sale being complete the plaintiff could make out his cause of action without any reference to the fraudulent matter, if

such there was, and that the Civil Judge was right in his view that the plea was altogether bad and that such a plea could not be pleaded.

The fallacy of the first of these arguments is the treatment of the document executed as the sale. A document itself is merely evidence of the transaction which it embodies. The principle is, as usual, well stated by the Civilians. "Emtio venditio perfecta est et mutuæ obligationes ex eâ fundatæ sunt simulac convenit inter contrahentes de re et pretio."[a] So that the perfected agreement creates the respective obligations of vendor and purchaser. One of the vendors is of course to deliver the thing sold, and if the obligation is not fulfilled it must be enforced by the action of the purchaser, as the plaintiff seeks to enforce it in this case. Then if the defendant can successfully show that, the agreement being void, no obligation has arisen, the plaintiff will fail. That a defendant, as was contended, cannot take advantage by plea of a joint fraud or illegality in the contract has, of course, no foundation, and the reason is that given by Lord Mansfield in *Holman* v. *Johnson*[b] to which we referred during the argument:—

"The objection," says Lord Mansfield, "that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this :—ex dolo malo non oritur actio. No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appear to arise ex turpi causâ, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant were to bring his action against the plaintiff, the latter would then have the advan-

(a) Mack., Sec. 368. (b) Cowp. 341.

1864. November 26. S. A. No. 447 of 1863.

tage of it, for where both are equally in fault, potior est conditio defendentis."

The Civil Judge was, therefore, of course in error in supposing that the defendant could not plead the joint fraud of himself and the plaintiff as a bar to an action upon a contract which the plaintiff was seeking to enforce by action. A large group of these pleas will be found in *Bullen and Leake*, page 511.

As to the distinction which Mr. Mayne drew between acts voidable by Statute and at Common Law, that distinction was stated in many of the old cases, but it applied solely to acts to be done under the contract and not to illegality in the consideration. Illegality in the consideration, whether by Statute or Common Law, rendered the whole contract void. As to acts to be done under the contract where the consideration is good, the performance of those which are legal, if severable from those which are illegal, will be enforced whether the illegality arise from Statute or Common Law, except in the cases of Statutes which by their language render the contract absolutely void. Of course the rule operates against the party who wishes to set the Court in motion. How terse the doctrine of the civilians, not differing materially from the rule of the law of England! "Si cui aliquid ob causam respectu solius ejus qui accepit, non etiam ejus qui dedit, turpem datum est; qui dedit illud condictione ob turpem causam repetere potest sed sine *usuris*. Sin datum est ob causam respectu solius ejus qui dedit turpem, hic datum repetere nequit, æque atque si turpiter et datum et acceptum est;"(a) and this is exactly the rule to be applied to the present case. If the defendant were seeking to eject the plaintiff and came into Court alleging that the sale was merely colorable, made to avoid the effect of an impending action, he could not recover because "*turpiter et datum et acceptum est.*"

Doe v. *Roberts*(b) and similar cases proceed upon the distinction between specialties and simple contracts. The deed established the title to the premises, and the defendant could not defeat that title by setting up his own fraud.

(a) Mack., Sec. 480. (b) 2 Barn. and Al. 367.

He could not plead want of consideration because a deed requires none to render it effectual. Where, however, it is sought to enforce a simple contract, we all know that the consideration must be made out. The defendant's answer is that there was no valuable consideration, and the statement of the fraudulent consideration is a mere repetition of this.

Mr. Mayne then sought an issue as to the creation of tenancy, entirely distinct from that as to the colorable transfer. It is quite clear, however, that this course would not meet the justice of the case.

If the original document was merely a colorable transfer for the fraudulent purpose stated in the answer and the acknowledgment of tenancy, if it took place, was merely an act giving completeness to the fraudulent and colorable transfer, it would clearly be tainted with the same vice, and the doctrine that a tenant cannot deny his landlord's title would be wholly inapplicable. We consider it necessary, therefore, that the Civil Judge should decide the following issues :—

I. Has the consideration of 400 Rupees stated in A been paid to the defendant ? Was any money paid ?

II. Was the document with the knowledge of plaintiff's father executed as a colorable transfer for the purpose stated in the answer ?

III. Was the document B executed by the defendant or not ? If executed, was there any, and if any, what considceratin for it ?

And if it is found that A was a mere colorable transfer for the purpose stated, was B a document merely executed for the further effecting of that purpose ?

Issue directed.

Appellate Jurisdiction.(a)

Referred Case No. 20 *of* 1864.

SI'TA'RA'MAN and others *against* SUSA PILLAI and others.

A suit properly alleging a malicious prosecution and special pecuniary loss resulting therefrom is cognziable in a Small Cause Court.

1864. *November* 28. *R. C. No.* 20 *of* 1864.

THIS was a case referred for the opinion of the High Court, by C. Lakshmaiya, the Acting Principal Sadr Amín of Salem, in Suit No. 285 of 1864, under Section 13 of Act XLII of 1860.

The suit was brought for recovery of Rupees 300, damages sustained by plaintiffs who were unable to attend to the cultivation of their lands by reason of a charge of assault falsely and maliciously preferred by the defendants. The charge was disposed of, in the first instance, by the Sub-Magistrate who convicted the prisoners and sentenced them, some to pay fines, and others to imprisonment. Upon appeal to the Deputy Magistrate, the decision was reversed and the prisoners were acquitted.

The plaint alleged that the prisoners had been under trial and in confinement from the 30th of March to the 21st May 1864, that being the time for cultivation, and that their lands were laid waste, by which they sustained damage to the amount which they sought to recover.

The questions submitted for the decision of the High Court were :—1st. Whether the damages claimed by the plaintiffs are special damages of a pecuniary nature as contemplated in the last part of Section 3(b) of Act XLII of 1860.

(a) Present : Scotland, C. J., and Holloway, J.

(b) Section III is as follows :—" The following are the suits which shall be cognizable by Courts of Small Causes constituted under this Act, namely, claims for money due, whether on bond or other contract, or for rent, or for personal property, or for the value of such property, or for damages, when the debt, damage, or demand does not exceed in amount or value the sum of five hundred Rupees. Provided that no action shall lie in any such Court on a balance of partnership account, unless the balance shall have been struck by the parties or their agents ; or for a share or part of a share under an intestacy, or for a legacy or part of a legacy under a will ; or for any claim for the rent of land or any other claim for which a suit may be brought before a Revenue Officer ; or for the recovery of damages on account of alleged personal injuries, unless special damage of a pecuniary nature shall have resulted from such injury.

1864. November 22. R. C. No. 20 of 1864.

2ndly. Whether a suit for such damages is cognisable by the Small Cause Court.

No Counsel were instructed.

The Court delivered the following

JUDGMENT:—The question put is whether the plaintiffs can sustain a suit for damage to their cultivation caused by their enforced absence from it owing to a prosecution instituted against them by the defendants?

We of course give no opinion upon the propriety or otherwise of the present plaint.

We answer that if a suit is brought, properly alleging a malicious prosecution and special pecuniary loss resulting from that prosecution, such a suit may be sustained in the Small Cause Court. The latter part of Section 3 of the Act only bars suits for personal injuries where those injuries have not produced, and are not alleged to have produced, consequential pecuniary loss.

Original Jurisdiction.(a)

Original Suit No. 239 *of* 1864.

ARTHUR M. RITCHIE *against* W. STOKES and another.

The Administrator General appointed under Act VIII of 1855 has the same right of retainer in satisfaction of his own debt as that which an ordinary executor or administrator has.

1864. Nov. 29, Dec. 7. O. S. No. 239 of 1864.

THE plaintiff sought for a declaration by a decree of the Court that the second defendant, John Miller, had no right, as Administrator General of Madras, to retain and apply the assets recovered by him as such Administrator General and as administrator to the estate and effects of Thomas Brass, deceased, in payment and satisfaction of his own claim against such estate to the exclusion of the other creditors of Brass, or any right to apply the assets recovered by his successor in office, the defendant Whitley Stokes, in payment of his own claim against the estate of Brass, and that the estate of Brass may be duly administered under the decree of the Court.

Present: Scotland, C. J., and Bittleston, J.

1864. Nov. 29, Dec. 7. O. S. No. 239 of 1864.

Three issues were framed by Bittleston, J., as follows :—

1. Whether the defendant, John Miller, being the Administrator General of Madras, had or has a right to retain any part of the assets collected and received by him as administrator of the estate of Thomas Brass in satisfaction of the debt due to him from the estate of the said Thomas Brass.

2. Whether the defendant, John Miller, was or is entitled to retain in satisfaction of his said debt any portion of the assets collected and received by the defendant, Whitley Stokes, during the time he held the said office of Administrator General and which were handed over by him to the defendant, John Miller, on his resuming charge of the said office.

3. Whether the present Administrator General is bound or entitled to retain any part of the assets of the said estate for the purpose of satisfying the debt due from the said estate to the said Arthur Macdonald Ritchie.

From the admissions agreed to by plaintiff and defendants it appeared that Brass was the Manager of the Administrator General's Office for some years. Upon his death, in April 1863, it was discovered by the second defendant that Brass had misappropriated and applied to his own use Government securities and various sums of money amounting to Rupees 45,343-5-8. Of this sum Rupees 6,750 was misappropriated while the plaintiff held the office of Administrator General, and the plaintiff paid that amount, with interest at 5 per cent. per annum, on the 28th of January 1864. The second defendant replaced the remainder of the sum misappropriated by Brass amounting to Rupees 38,593-5-8. Upon the discovery of the defalcations of Brass, who died intestate, the next of kin renounced in favor of the second defendant who petitioned the Court as Administrator General and obtained letters of administration to the estate of Brass on the 13th of April 1863. The second defendant collected the assets and administered the estate until the 28th of May 1863, when he left Madras for England. He retained out of so much of the assets of Brass's estate as he had realized a sum of Rupees 19,500 on account of Brass's debt to him. Stokes

was appointed officiating Administrator General during the absence of Miller and realised further assets on account of Brass's estate. Miller returned to Madras on the 13th October 1864, and resumed his duties, and he retained a further sum of Rupees 12,000 which had been collected by Stokes and which passed into Miller's hands upon resuming charge of the office. The estate of Brass is still indebted to the second defendant in Rupees 7,093-5-6. The plaintiff held the office of Administrator General from the 18th April 1860 till the 1st May 1861. No part of the debt due to the plaintiff has been paid to him out of Brass's estate, and there are several simple contract creditors of Brass's estate who have not been paid.

Mayne, for the plaintiff. If this were the case of an ordinary executor or administrator there could be no doubt of the right to retain his own debt in preference to every other creditor of the same class, but this right could not be admitted in the case of the Administrator General who was a public official Administrator. There was, as might be expected, no precedent by which they could be guided derived from English Law. The two grounds upon which the right of retainer was permitted were stated in the last edition of *William on Executors*(a) and *Fonblanque's Equity*.(b) The one was founded upon the maxim "*in equale jure potior est conditio possidentis*," and the other was the reason given by Blackstone(c) that, as the executor could not commence a suit against himself, he would be exposed to great hardship if he were not allowed to retain a debt due to himself. As regards the first ground, this was not a case of *equale jure* at all, but was a case involving a conflict of private right and public duty. As regards the second ground, the technical rule of common law which prevented an executor from suing himself placed him in the difficulty of being unable to recover his own debt. Whatever might have been the justice of this principle in the days of technical common law and when the remedial jurisdiction of equity was not established it had no application or force now; and when they had to apply the principle of retainer to a completely different case, that namely of a per-

(a) Williams on Exrs. 937. (b) 2 Fonb. Eq. 402, Ed. 1820.

(c) 2 Black. Com. 511. 3 Black. Com. 18.

1864. Nov. 29, Dec. 7. O. S. No. 239 of 1864.

son who, though he had the name was in a completely different position to an ordinary administrator, the Court would consider whether, in justice, the doctrine of retainer ought to be held to exist. If not the Court would not be disposed to extend the rule. It was clear that the Administrator General had a complete remedy in equity, and in fact if he found claims were being made in respect of an insolvent estate it was his duty to file an administration suit. The doctrine of retainer was not one which Courts of Equity were desirous of extending: for instance an executor or administrator was not permitted to retain a legacy given to himself.[a] [SCOTLAND, C. J :—In an administration suit a Court of Equity would permit an executor to pay himself a debt due ?]

Undoubtedly the Court admitted to the full extent the right of the executor or administrator to pay himself a debt, but the practical objection stated by Blackstone was removed by a Court of Equity. The principle that an executor or administrator cannot sue himself had no application to the Administrator General. There was nothing to prevent Miller from suing the Administrator General who happened to be Miller. [BITTLESTON, J :—If Miller sues the Administrator General, and the Administrator General admits the debt, what is the use of the suit? Would not the proceeding be futile ?]

He would be only entitled to priority of suit in that case. Joint Stock Companies are now sued in the name of a public officer, and there was nothing to prevent any one suing himself as public officer of a Company for salary due to himself, his name being merely used as representing the Company. Here the Administrator General was a continuous corporation sole, and there was nothing to prevent Miller suing the Administrator General of Madras to recover a debt due to him out of an estate which the Administrator General was administering. [BITTLESTON, J :—The Act itself gives him no authority to administer any estate. He derives his authority in each case from the letters of administration granted to him by this Court.]

But his authority to get letters of administration is derived from Act VIII of 1855. If he were not Adminis-

(a) 2 Fonb. Eq. 403. Ed. 1820.

trator General he would not get authority to administer the estate in each case. [SCOTLAND, C. J :—Are there any provisions in the Act which make his administration different from that of an ordinary administrator under the general law ?] 1864. Nov. 29, Dec. 7. O. S. No. 239 of 1864.

No, except that he had a right to get administration of estates in preference to others. He had various rights, such as commission, which he would not have if he were an ordinary administrator. All the assets in his hands passed away to the person who, by act of the Government, became his successor. No ordinary administrator was entitled to a commission. Act VIII of 1855 took away the commission from an ordinary administrator. The Administrator General was not required to give security in each case, nor was he compelled to swear to his petition. [BITTLESTON, J :—There is nothing in the Act which alters the course of administration. He is bound to administer the estate in the same way as any other administrator, except that he is entitled to a commission.] He was a corporation who got the administration in a different way and had a preference over all others. The moment his public capacity as Administrator General ceased, so did also his right to administer a particular estate which right was transferred to his successor in the public office. The whole tenor of the Act showed that the Administrator General was put in for the purpose of managing the estate for the creditors, and he was not allowed to get any advantage for himself except the statutory one of commission. [BITTLESTON, J :—The commission is expressly given by the legislature. But his right to retainer was not taken away. Surely it would require some expression of the legislature to take it away, especially as he was to administer in the same way as any other administrator.] [SCOTLAND, C. J :—Can it be said that there is anything in the right of retainer which is contrary to the wholesome policy of the Act ?]

The Act appointed a public officer for a public purpose, and the officer so appointed was not allowed to derive any advantage for himself save that which the Act expressly gives him. The Courts before granting administration would bind the administrator not to pay his own debt ex-

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cept rateably with others.[a] In this case, however, the Administrator General asked for administration not as a creditor but in his public capacity as Administrator General. The next point was as to his right to retain out of the amount received by Stokes. Miller had no right, *pendente lite*, to retain the assets which came into Stokes's hands. To these assets the right of retainer did not attach, seeing that a suit was filed asking that the assets should be applied to the payment of creditors generally. The right to retainer was a personal one and could not extend to the assets which had been received by Stokes. [BITTLESTON, J :—Stokes having had notice of this litigation ought not to have paid over the amount to his successor.]

He was bound to do so by the Act. [SCOTLAND, C. J :—Miller on succeeding finds assets for administration, and the Court, in an administration suit, would administer those assets like any other. If a Court of Equity would allow an administrator to retain his debt the present administrator ought not to be in a worse position.]

The third point was whether Miller was not bound to retain in favor of Ritchie. The Administrator General was a corporation, and if he was entitled to retain for himself he was entitled and bound to retain for his predecessor. In both cases the debt from the estate was due to the Administrator General, and, was one entire debt which could not be split up.

The Advocate General, for the defendant, Miller. Ritchie could not under any circumstances have any portion of the assets of Brass's estate paid to him except as a general creditor. The right to retain did not belong to Miller as Administrator General, but as administrator of Brass's estate. As Administrator General he had no right of retainer at all: his right was derived from the letters of administration from this Court. [SCOTLAND, C. J :—If he brings himself within the provisions of the Act it is compulsory upon the Court to grant him letters of administration.] It was as administrator of the particular estate, that he had the right to retain; and Ritchie never having been administrator of Brass's estate, it was impossible that he

(a) 2 Williams, Ex. 943. Toller, 105.

could retain. The argument founded upon the principle of *equale jure* and that the Administrator General might come into a Court of Equity and sue himself proved too much, for it applied to every administrator. It was said that a Court of Equity would not permit an administrator to retain a legacy, but that was because debts took priority over legacies, and there was no doubt if the administrator's right to retain his debt. If the legislature meant to deprive the Administrator General of the right to retain which was given to him by the common law it would have said so: but there was nothing in the Act to deprive the Administrator General of the right. If it was intended to take away the right it would have been done in express terms or by necessary implication. Unless a distinction could be established between the Administrator General and an ordinary administrator there was no question to decide. After suit brought and up to decree an administrator or executor had a right to pay any particular creditor.[(a)] There may be cases in which an administrator will be bound to waive his right of priority. When several creditors were before the Court in equal right it was necessary that the creditor to whom administration was granted should waive his rights in favor of the whole body. That was not the case here. There was no one in *equale jure* before the Court, the next of kin having renounced. [SCOTLAND, C. J:—At all events no such condition was imposed in this case, assuming that it could be.] Then it was said that the monies which came into the hands of Stokes ought not to be retained by Miller. If so the remedy was against Stokes for a *devastavit.* It was argued that a *lis pendens* made some difference. But this could not be true, for notwithstanding suit pending the right of the administrator to retain up to decree was undoubted, and even when the money was paid into Court the right of the administrator still attached. Stokes might have paid Miller notwithstanding the *lis pendens*,[(b)] and when the assets came into Miller's hands he might pay himself. At the time the defalcation took place, the debt arose as between Miller and Brass, and the cause of action arose at the time of taking.

(*a*) Williams on Ex., pp. 933, 935.

(*b*) William on Ex. 933.

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Mayne, replied. There was no debt due to Miller until he had paid the amount of Brass's defalcation. He could not have sued Brass for the debt until he had prosecuted and convicted him, *Choune* v. *Baylis*.(a) The foundation of his claim against Brass's estate was the payment of the money to Government which Brass had improperly appropriated. The claim of Ritchie was the same, and arose from the moment he paid the money on account of Brass's defalcation. The right of retainer which an ordinary administrator had was one which ought not to be extended in favor of a person not standing in the same position as an executor or administrator. The defendant, Miller, was the Administrator General acting officially for the general body of creditors, and that he was so was shown by the fact that his successor came in with exactly the same powers, for it was not necessary that the successor should come to the Court for new powers. The Administrator General was entitled to letters of administration in preference to creditors. The Court could not refuse to give him the powers which he sought; the result was that the creditors could not make any stipulation that the Administrator General should administer for the whole body. The Act could never have intended to confer a right upon the Administrator General in preference to all others seeking for letters of administration, and that the powers conferred by the Act should be exerted not for the benefits of the whole body of creditors, but that they might be diverted to his own exclusive benefit. The legislature could not have intended that the Administrator General should be permitted to collect the assets of Brass's estate and appropriate them to the payment of his own debt to the exclusion of other creditors and that he should receive 5 per cent. by way of commission for the operation. Miller could have no right to retain the money which Stokes received. The right could only attach to the money collected by himself. When the money came into his hands he was bound to deal with in the same way as Stokes would have been found to deal with it.

Cur. adv. vult.

(a) 31 L. J. 757.

The judgment of the Court was given as follows this day by 1864. Nov. 29, Dec. 7. O. S. No. 239 of 1864.

SCOTLAND, C. J:—We see no ground in this case for doubting, that if Mr. Miller had been simply an ordinary administrator of Brass's estate under letters of administration granted to him by the Ecclesiastical Court, whether as creditor or otherwise—he would have been entitled to retain assets in his hands for the satisfaction of his debt, due from that estate, under the admitted circumstances of this case. The intestate was bound to account and pay over to Mr. Miller, as Administrator General, all sums of money received by him, and was, therefore, in fact at the moment of his death indebted to Mr. Miller in the amount which had been misapplied by him—and the subsequent payment of that amount by Mr. Miller, under his obligation to the Government, places him in no worse position. Brass's estate was still indebted to him, as it had been before, and even if the estate was not indebted before, it would then have become indebted to him. The right of retainer is not confined to debts due to the administrator by the intestate at the time of his death, for if, after the death, he pays debts due by the testator out of his own money in due course of administration, he becomes a creditor for the amount so paid and may retain assets to pay himself—2 *Fonb. on Equity* 409, *and cases there cited.*

We think also that the pending of the present suit is no bar to the right of retainer; and the question in the case is therefore narrowed to this—whether the Administrator General stands (as respects this right of retainer) in any different position from that of an ordinary executor or administrator. We have looked carefully through Act VIII of 1855, and the previous legislation which led up to that Act. By the 40 G. 3, c. 79, sec. 21, as well as under the Charter of the late Supreme Court issued thereon—the Court was required to grant to the Ecclesiastical Registrar in the absence of next of kin or creditors—letters *ad colligenda bona* or of administration; by virtue whereof the Registrar was to collect the assets, and account to the Court in the same manner as where assets were vested in an officer by the equitable jurisdiction of the Court. Then, by Act

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VII of 1849 for the appointment of an Administrator General in Bengal, it was provided that in the absence of next of kin or executors willing to prove—the Court shall grant to the Administrator General letters of administration, or *ad colligenda bona*, by *virtue whereof* he shall collect the assets, and account as therein directed. The Act also provides that as Administrator General he should not be an officer of the Supreme Court *nor otherwise accountable to it than any ordinary executor, administrator or grantee of letters ad colligenda.* The intention of the legislature appears very clearly throughout these Acts to be, that the Administrator General should derive his authority, as administrator of each estate, from the letters of administration committed to him by the Court, and should have all the ordinary rights and be subject to all the ordinary liabilities of administrators, except so far as the same are expressly altered or qualified. The Act VIII of 1855, the Act now in force in each of the three Presidencies, expressly provides, by Sec. 24, that the letters of administration shall authorise the Administrator General to *act as administrator of the estate* to which such letters shall relate. That is the statutary definition of his authority. And though the Act provides that the authority so given shall pass upon his death, removal, or resignation, to his successor in office, that provision is in no degree inconsistent with the notion that the person who is Administrator General at any particular time, and as such is made the administrator of each of several estates, should during that time have all the authority of an ordinary administrator. Again Sec. 27 declares that the commission to which the Administrator General shall be entitled is intended to cover, not merely the expense and trouble of collecting the assets, but also his trouble and *responsibility in distributing them in due course of administration*, and the right of retainer for his commission is declared to be a distribution in due course. This, as well as other sections, refers the Administrator General to the ordinary course of administration according to law, and places his responsibility on the same footing as that of an ordinary administrator—unless of course special provisions to the contrary are found in the Act. The only special provision of that nature is contained in Sec. 23, which qualifies in some respects the general law as regards the duty and responsibility

of the Administrator General on the payment of debts. According to the general law an administrator is bound to take notice of all debts of record, whether he has actual notice or not, and this distinction as well as all question as to whether in the case of other debts the notice should not be by suit is got rid of by Section 23, which provides that any payment or delivery of assets by the Administrator General after one year from the grant of the letters of administration, shall be allowed to him as against all creditors and other claimants of whose debts or claims he shall not have had notice, and that no notice shall affect him unless proceedings to enforce the debt or claim be commenced within one month after the notice and prosecuted without delay.

These observations in effect dispose of the three issues raised. With respect to the first issue, the result is, that in our opinion Mr. Miller had and has a right to retain any part of the assets collected and received by him as administrator of Brass's estate, in satisfaction of the debt due to him from such estate. With respect to the second issue, we think he is also entitled to retain the assets collected by Mr. Stokes, and handed over to him on his resuming charge of the office of Administrator General. In our view whilst Mr. Stokes held the office he was clothed with the ordinary rights and responsibilities attached to the administration of Brass's estate by virtue of the letters of administration issued by this Court, and might have distributed the assets which came to his hands in payment of debts in due course of administration; but instead of doing so, he handed over to Mr. Miller the assets which he had collected and which then became assets in Mr. Miller's hands as administrator for distribution. Then as to the third issue, we think that it is a fatal objection to any claim of retainer out of Brass's estate on the part of Mr. Ritchie, that he never was administrator of that estate. He stands on the same footing as any other simple contract creditor, and could gain no preference except by suit and decree or judgment, or by the act of the Administrator General in office, if he thought proper as administrator of the estate, to pay him. The issues being disposed of in favor of the defendant, Mr. Miller, there appears to be no ground or necessity for administering the estate under the decree of this Court, and therefore the suit

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will be dismissed. As regards costs, there appears to be no estate out of which costs could be paid, and we think the case is one in which the parties respectively should bear their own costs.

Suit dismissed.

Appellate Jurisdiction.[a]

Special Appeal No. 184 *of* 1863.

PARAKUT ASSEN CUTTY.......................*Appellant.*

EDAPALLY CHENNEN..........................*Respondent.*

Where a plaintiff sues upon his jenm title, having previously instituted a suit in which he unsuccessfully set up his kánam right, the latter suit cannot avail to prevent the Statute of Limitations from running against him.

1864. December 5. S. A. No. 184 of 1863.

THIS was a special appeal from the decision of E. Cullen, the Principal Sadr Amín of Cochin, in Appeal Suit No. 101 of 1858, reversing the decree of the District Munsif's Court of Velliangode, in Original Suit No. 349 of 1856.

Mayne, for the special appellant, the third defendant.

Rájágópálachárlu, for the respondent, the plaintiff.

The facts appear sufficiently from the following

JUDGMENT :—This was a suit brought to recover certain land. The District Munsif decreed against the plaintiff, and that decision, on appeal, was affirmed. The Principal Sadr Amín, however, upon a review of judgment passed a second decree reversing the District Munsif's decree and deciding that the plaintiff was entitled to recover as jenmee.

Upon the first hearing of the appeal, this Court thought it doubtful whether the plaintiff's jenm title had been satisfactorily decided, and therefore required the lower appellate Court to return a finding on the issue "whether or not the plaintiff possessed the jenm title to the property?"

Considering also the frame of the plaint by which, notwithstanding the decree in the former suit, the kánam claim was a second time made the ground of suit, and that the

(a) Present : Scotland C. J., and Phillips, J.

jenm title was brought forward in a supplemental or amended plaint, we were of opinion that the special appellant ought to be at liberty to rely, if he could, upon the law of limitation, for which purpose we directed the further issue, "whether or not the plaintiff's right was barred by lapse of time?" The finding upon these issues were in favor of the plaintiff.

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The question now raised is whether or not the Principal Sadr Amín was in error in finding that the suit was not barred by the law of limitation, and we are of opinion that he was in error in so deciding. The plaintiff's whole claim as regards the kánam being got rid of, there is no evidence in the case of any enjoyment since 1816. But the Principal Sadr Amín seems to have been of opinion that the proceeding in 1846 to 1849, in which the plaintiff unsuccessfully set up his kánam right, and in which the plaintiff's jenm title was not in question, had the effect of giving to the plaintiff a new period of limitation dating from the final decision in August 1849. In this respect the Principal Sadr Amín was wrong. The plaintiff's cause of action as jenmee had accrued, if at all, long before the institution of the suit in 1846, and it appeared that there had been adverse enjoyment since 1816. Time, therefore, was running against the plaintiff's claim when that suit was brought and continued to run after its termination. The plaintiff could not prevent the time from running against his jenm title by bringing a suit upon a wholly unfounded kánam claim. There was therefore a lapse of more than 12 years between the cause of action and the bringing of the present suit and consequently the Principal Sadr Amín's decree of the 13th December 1862 must be reversed and the suit dismissed.

As, however, the law of limitation was not set up in the first instance in the Court below, we think that each party should bear his own costs of the appeal to this Court.

Appellate Jurisdiction.(a)

Regular Appeal No. 22 *of* 1864.

KAMBINAYANI JAVAJI SUBBARAJULU NAYANI-VARU.......................... ....} *Appellant.*

UDDIGHIRI VENKATARAYA CHETTY and others...*Respondents.*

The Act for limitation of suits (Act XIV of 1859) came into operation on the 1st January 1862.

By an order of the Civil Court it was declared that all suits brought on the 4th January 1862, when the Court was re-opened after the adjournment for the Christmas holidays, should be treated as if brought under the old law of limitation.

A suit was brought on the 4th of January 1862, which was barred by Act XIV of 1859. *Held* that the Act applied, and that the suit was barred.

The maxim *actus curiæ neminem gravabit* observed upon.

1864. *December* 8. *R. A. No.* 22 *of* 1864.

THIS was a regular appeal from the decree of C. A. Roberts, the Civil Judge of Chittoor, in Original Suit No. 4 of 1862.

Rájágópálachárlu, for the appellant, the 3rd defendant.

Rangaiya Naidu, for the 1st respondent, the 1st plaintiff.

The Court delivered the following

JUDGMENT :—This suit was brought on 4th January 1862 and by the new statute of limitations, which finally came into operation on 1st January, it is is clearly barred.

The Civil Judge considers it not barred on account of an order of the late Civil Judge which declared that all suits brought on 4th January should be treated as if brought under the old statute. This order was made to meet the possible inconveniences of the adjournment of the lower Court for the Christmas holidays which was in that year for the first time unexpectedly ordered by the Madras Government.

It would, perhaps, have been well if some arrangement had been made for the despatch of business, but we are unable to see the slightest justification for the order of the Civil Judge. The legislature said that all cases not brought

(a) Present: Frere and Holloway, J. J.

1864. December 8. R. A. No. 22 of 1864.

before the 1st January shall be subject to the new law; the Civil Judge says that they shall not be subject if they are brought before the 5th. It is quite manifest that the Civil Judge had no power so to order.

In illustration of the construction to be put upon statutes of limitation we may refer to *Beckford and others* v. *Wade*,[a] a case before the great Judge Sir W. Grant in the Privy Council. It is clearly shown that no sort of equitable construction can be put upon such statutes, and on the very question of closing the Court the following passage is curiously in point:—"A very strong case is put—that of the Courts of Justice being shut up in time of war so that no original could be sued out; and yet it has been given as the opinion of learned Judges that even in that case, the statute would continue to run." Bridgman and Holt, Chief Justices, are the Judges referred to.

We consider it wholly impossible to say that there was any default here of the Court or its officer, and the cases, of which *Nazer* v. *Wade*[b] to which we referred during the argument is the last, have no application. We will only observe that the maxim "actus curiæ neminem gravabit" requires much qualification, and that *Leech* v. *Lamb*[c] is a very strong authority for saying that the dictum of Coltman, J., that a Court will always correct the mistake of its officer,[d] is by no means universally true.

We entertained no doubt at the hearing that the plaintiff was clearly barred, but being informed that many causes depended upon the same principle, we have mentioned the case to our colleagues, and the present judgment is in accordance with our and their unanimous opinion.

We must reverse the decree of the lower Court, but the statute not having been pleaded in the lower Court, we make no order whatever as to costs.

Decree reversed.

(*a*) 17 Ves. 93.

(*b*) 1 B. and Sm. 728—See also *Cornish* v. *Hockin*, 1 El. and Black. 602, and the cases there cited.

(*c*) 11 Exch. 437. (*d*) 7 Com. B. 824.

Appellate Jurisdiction.(a)

Regular Appeal No. 16. *of* 1864.

PEDDAMUTHULATY and 2 others...*Appellants.*
N. TIMMA REDDY...............*Respondent.*

Mere laches, or indirect acquiescence, short of the period prescribed by the statute of limitations, is no bar to the enforcement of a right absolutely vested in the plaintiff at the time of suit.

Semble, the doctrine of acquiescence or laches will apply only to cases, if such there are, in which they can be regarded as a positive extinguishment of right. When they go merely to the remedy, the Courts have no power arbitrarily to substitute an extinguishing prescription different to that determined by the Legislature.

The different principles upon which Courts of Law and Equity in England administer justice observed upon, and the necessity of bearing in mind this distinction, when English cases are referred to, pointed out.

1864. *December* 10. *R. A. No.* 16 *of* 1864.

THIS was a regular appeal from the decree of F. S. Child, the Civil Judge of Cuddapah, in Original Suit No. 3 of 1863.

Rungiah Naidu, for the appellants, the plaintiffs.

The Court delivered the following

JUDGMENT :—This is a suit by 3 brothers, one the eldest son of an undivided family, to procure the setting aside of a sale of family property made by the father, a very aged man, and the third son. The land had been delivered to the purchaser in accordance with a decree of the Civil Court.

The Civil Judge considered the sale by the father and one of the sons valid. He seemed to go partly upon the grounds that they were managing members, and that the other sons had not protested, and partly upon the grounds that although each co-parcener could only alienate his own share, yet that this did not apply to each parcel of land, and that the extent of the rule was the forbidding of an alienation beyond the gross value of the alienor's entire share.

In this Presidency it was long thought that any alienation without the assent of all the co-parceners was absolutely void, and many decisions were passed by the late Sudder Court setting aside such sales. There were also decisions the other way. They are reviewed in Madras

(a) Present : Frere and Holloway, J.J.

H. C. Reports, Vol. I, p. 476; and the Court there distinctly recognized the incidents of joint tenancy in decreeing to plaintiff Ayasami's share of one of the houses. The power of the father and one son to sell is a bare question of law. The purchaser well knew the condition of the family, and knew, if that were necessary, that two members could at the utmost sell the interest which they had, viz., two undivided fifth shares. There is not a scintilla of evidence that the other sons were either present at the sale, were asked for their assent to it, or gave that assent. On the contrary, there is ample evidence that one of them was absent from the place, and there has not been an attempt to prove, except in the manner afterwards shown, that any other than the two who executed the document joined in the sale. The Civil Judge says that they must have been aware of the sale, and therefore there was an implied assent. We are quite unable to see, upon the evidence, anything more that a pertinacious resistance to the effectuation of the sale. The Civil Judge appears here to be applying a portion of what Jervis, C. J., called the "abominable standing by doctrine," but this is clearly inapplicable, for it is a standing by after the event, and the only standing by which could then affect their legal rights, was doing so for the period required to bar the remedy.

There are same observations upon the true application of this doctrine at II. Mad. H. C. Rep., p. 34. To estop a person from complaining of an illegal act, the representation made, either by words or by silence, must amount to a license to do an act, or to an abandonment of the representer's right to prevent it, and the other party must through that representation be led to alter his situation. Here the evidence (inconsistent with the second defendant's original statement that all were present) that the third plaintiff was present in the choultry when the sale was made, is manifestly false; the Civil Judge does not say that he believed it, and there can be no doubt that, if that plaintiff had been there assenting to the sale, he would have been required to execute the document.

The Civil Judge also adverts to the fact of the defendant having been put into possession of the land and of his having enjoyed it for some months. We are quite unable

1864. December 10. R. A. No. 16 of 1864.

to see that the question would be affected by this. That question is, did the present plaintiffs sell their undivided shares to the defendant? That the plaintiffs were passive for some months after the sale and delivery would by no means prove this, but as the somewhat vague language used seems to imply that the plaintiffs are barred by acquiescence from complaining, it is as well to make some observations upon this doctrine, which we find pretty generally misunderstood.

The existence in England of two sets of Courts, administering justice upon different processes, renders a resort in this country to English cases and dicta somewhat perilous, unless this distinction is constantly kept in mind. A principle for the guidance of our Courts can only be eliminated from a careful consideration of what would be the joint operation of Courts of law and of equity in the particular case. The case of *Clarke* and *Chapman* v. *Hart*,(a) in which the decision at the Rolls was reversed, is very instructive. The principles which are to guide a Court of Equity even administering equitable relief are thus stated in the judgment of the Lord Chancellor :—" Where a person is obliged to apply for the peculiar relief, afforded by a Court of Equity to enforce the preformance of an agreement, or to declare a trust, or to obtain any other right of which he is not in possession, and which may be described as an executory interest, it is an invariable principle of the Court that the party must come promptly, that there must be no unreasonable delay, and if there is anything that amounts to laches on his part, Courts of Equity have always said, ' we will refuse you relief.' With regard to interests which are executed, the consideration is entirely different. There, mere laches will not of itself disentitle the party to relief by a Court of Equity, but a party may by standing by, as it has been metaphorically called, waive or abandon any right which he may possess, and which under the circumstances, therefore, a Court of Equity may say he is not entitled to enforce." Where, therefore, on principles peculiarly equitable, a person applies to a Court of Equity to do for him that to which his bare vested rights would not entitle him, a Court

(a) 6. House of Lords Cases, 633, VI. De. G. M. & G. 232, and 19 Beav. 349.

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of Equity is entitled to say and does say, "You are entitled to no favor, you were bound to come within a reasonable time." What is that reasonable time is a question varying with the circumstances of each particular case.

The question varies much, too, with the nature of the property. Most of the cases in which this doctrine has been applied and the strongest of them, *Prendergast* v. *Turton*[a] were mining cases. This, the only supposed authority for refusing to enforce a right absolutely vested, was put by Lord Lyndhurst on the ground of positive waiver. It was a case in which the other partners had irregularly declared the interest of the plaintiffs in the partnership forfeited. The plaintiffs after a remonstrance left the country, allowed the other partners to expend money on what then seemed an unprofitable concern, and returned seeking to share in the benefits when it was becoming profitable. The Lord Justice Bruce, who decided both *Prendergast* v. *Turton*, and *Clarke* v. *Hart*,[b] greatly doubted whether the cases were distinguishable. If they are not, *Prendergast* v. *Turton* was clearly overruled by the decision of the House of Lords.

Clegg v. *Edmondson*[c] is a case which clearly illustrates the distinction. There, as in *Clarke* v. *Hart*, partners were excluded from a mining adventure, and the excluding partners procured a renewal of the lease to themselves. It is of course an inflexible construction of a Court of Equity that there is a trust of the renewed lease for the excluded partners, but, although for 9 years the excluded partners had been verbally asserting their rights, it was held inequitable after that lapse of time for them to seek a peculiarly equitable remedy.

The Lord Justices both advert to the distinction between a constructive and a direct trust, and to that between mining property subject to so many vicissitudes and a common farm.

On the whole, it may be taken as the law both of courts of law and equity, that mere laches, short of the period prescribed by the statute of limitation, is no bar whatever to the enforcement of a right absolutely vested in the plaintiffs at the period of suit.

(a) 13 Law Jour. Ch. 268.

(b) Supra. (c) 26 Law Jour. Ch. 673.

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As to absolute waiver by holding out to a man a representation upon which it is intended that he should act, the rule is precisely the same at law and in equity, as was stated by Lord St. Leonards in the case of *Bargate* v. *Shortridge*,(a) and by all the law Lords in *Clarke* v. *Hart*.(b) That rule is to be found in *Freeman* v. *Cooke*.(c) The reason was stated by Papinian "nemo potest mutare consilium in alterius injuriam," and there clearly can be no injuria where a man seeks to enforce his legal rights, against one who has invaded them without any license of the sufferer. *The Duke of Beaufort* v. *Patrick*(d) and *Watts* v. *Hyde*(e) and the whole class of cases in which injunctions have been granted against the plaintiff taking advantage of the title of the defendant at law being incomplete on account of the omission of some legal formality, proceed upon the same principle. It is inequitable and indeed fraudulent to allow those or the representatives of those, who have either by their statements or their acts represented the legal formality as unimportant, to take advantage of its absence.

The fact that in *Clarke* v. *Hart* the decision of that eminent Judge, the Master of the Rolls, was reversed, will show that the English doctrine has been very shifting upon this matter and would excuse a somewhat lengthened commentary. That commentary is *here* however absolutely necessary, for the doctrine of the Courts has amounted to a virtual substitution by them of a new statute of limitations for that made by the legislature. The law said, you shall enforce your rights if you come within a period of 12 years from their infringement; the Courts said, you shall be barred at any period short of the statutary period at which we think that you have been unduly negligent. In the present case the plaintiffs sued within 4 months of being deprived of their property, and if the doctrine of mere laches were, as it is not, applicable to cases of the present class it would not be applicable to this case.

In considering the application of the doctrine of mere laches, it must not be forgotten that the Limitation Act is here applicable to all suits; that while, until very recently, the English Courts of Equity only dealt with lapse of time

(a) 5. House of Lords Cases, 297.
(b) Supra.
(c) 2 Exch. 654.
(d) 17 Beav., 60.
(e) 2 Coll. 368.

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in analogy to the statutes of limitation in this country, the Act applies to all suits. It will probably be found that the doctrine of laches and indirect acquiescence will apply only to cases, if such there are, in which they can be regarded as a positive extinguishment of right. When they gò merely to the remedy, it is quite clear that the Courts have no power arbitrarily to substitute an extinguishing prescription different from that determined by the legislature.

We announced at the hearing the decree to be made. We can find no warrant for the doctrine of the Civil Judge ousting these co-parceners from their right to their undivided shares in this particular land. The question is simply whether the plaintiffs have a right to eject the defendant from their undivided shares, and it is quite clear that they have, because defendant has acquired no title whatever to them. We therefore reverse the decree of the Civil Court, and declare the plaintiffs entitled to have three-fifths of the land sued for, divided from that acquired by the defendant and delivered to the plaintiffs. The defendant will pay the costs of the plaintiffs.

Appeal allowed.

Appellate Jurisdiction.(a)

Regular Appeal No. 48 *of* 1864.

YARAKALAMMA, WIFE OF ANAKALA NAGAMMA and another.................................... } *Appellants.*

ANAKALA NARAMMA..*Respondent.*

The rule which makes a judgment conclusive against parties and those who claim under them is subject to certain exceptions which are the offspring of positive law, and the reason for the exception may be generally stated to be that the nature of the proceedings by which there is a fictitious though not unjust extension of parties renders it proper to use the judgment against those not formally parties.

The rule as to judgments in rem in some peculiar cases results from the nature of the proceedings, and before attempting to apply the rule in this country consideration should be given to the question whether there are Courts so proceeding as to warrant the application of the doctrine of decrees in rem.

Mr. Smith's definition of a judgment in rem discussed and dissented from, and the authorities in English and Roman Law on the subject examined and commented upon.

1864. *December* 15. *R. A. No.* 48 *of* 1864.

THIS was a regular Appeal from the decree of R. Davidson, the Acting Civil Judge of Nundial, in Original Suit No. 15 of 1862.

Gordon, for the appellants, the defendants.

Branson, for the respondent, the plaintiff.

The Court delivered the following

JUDGMENT:—The suit was substantially to set aside a sale of property made by first defendant, an issueless widow, of land, on the ground that the land vested at the death of first defendant's husband in plaintiff's husband, his undivided brother, and that he being insane, plaintiff claims them as the guardian of her minor son.

The defendants alleged, as it seems, division, disputed the amount of mesne profits, and denied the right of plaintiff to sue, her husband being sane.

We must take it that these are the questions at issue, and that the parties knew them to be so, for these issues were framed by the Judge and the case has been brought before us in appeal upon this footing.

(a) Present: Phillips and Holloway, J. J.

1864. December 15. R. A. No. 48 of 1864.

The written statements, however, certainly do not place in issue these points, for those of the defendants are confined to the statement of the name in which the puttah was issued and the amount of mesne profits :—so that, if the case had not been conducted upon a different footing, there would be only three questions :—Is the title of the persons whom plaintiff represents good in point of law? Does she properly represent them? What is the amount of mesne profits which ought to be decreed if restoration is ordered? The other matters came out upon the oral examination of the pleaders.

The Civil Judge considered the questions of division and that of first defendant's right to sell settled by the Decree in Appeal Suit No. 3 of 1860, and he considered the insanity of plaintiff's husband made out by the evidence. In fact the second issue framed by the Civil Judge was not an issue at all, for conceding, as seems to have been done, that the property was that of the deceased brother and was family property, unless the brothers were divided, the inability to sell followed as a mere legal inference from the establishment of the former proposition.

In the argument for the appellants it was contended that the question of division was not settled by Appeal Suit No. 3 of 1860 in which the point arose collaterally, and that there was no satisfactory evidence of the husband's insanity: the woman therefore had no right to sue. On the other hand, it was urged that there was ample evidence of insanity, and that the Decree in Appeal Suit No. 3 of 1860 was, because it determined a question of status, a decree *in rem* binding upon all the world. Neither of the practitioners had seen the Decree in No. 3 of 1860. The one asserted that it would be, the other that it would not be, binding upon the defendants.

As we see no reason for dissenting from the conclusion of the Civil Judge that incapacity of the plaintiff's husband was sufficiently proved for the purposes of the present cause, we will only remark that if it had not been established, seeing that the infant son had a vested interest in the property of his father, it is pretty clear that it would have been quite within the discretion of the Court to allow her to sue as guardian *ad litem* to her infant son. It is quite clear

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that the point of division was distinctly decided against the present second defendant in No. 3 of 1860. There, the second defendant sued as plaintiff to obtain a declaration that a sale to him by present first defendant was valid. Third defendant, the present plaintiff, resisted that decree on the ground that the present first defendant had no right to sell the property which belonged to the husband of first defendant and her (plaintiff's) husband, who were members of an undivided family. Judgment was given against the plaintiff on the ground that the property was that of an undivided family of which one of the brothers still survived, and that the widow of the deceased brother could not therefore make a sale of it. We must not be supposed to be expressing an opinion that a suit for such a declaration by a person in possession ought to have been permitted. It is sufficient to say that this issue, which was absolutely necessary to the decision of a cause promoted by the plaintiff himself, was decided against him. The doctrine of mis-application for want of mutuality, one very questoinable in point of principle, does not apply, for the present plaintiff was also a party to the suit and raised the exception which the Court sustained.

It is quite clear, therefore, that this appeal cannot be sustained, and but for the peculiarity of the position of this Court and the fearful miscarriages of justice which have flowed from the entire mis-apprehension of the doctrine of decrees *in rem*, we would gladly avoid the discussion of this subject. The Sivaganga case afforded an opportunity for dealing with the question. The miscarriage of justice there arose from the entire mis-apprehension of the doctrine, and we might fairly have expected that the high tribunal which in the last resort decided that case, composed as it is not merely of common lawyers, would have done something for the instruction of inferior tribunals upon a matter of so much difficulty that four learned common law Judges in *Caspigne* v. *Imrie*[a] were satisfied that the judgment of the French Court was not one *in rem* and seven other learned Judges of the Exchequer Chamber were as satisfied that it was one. In *Camnell* v. *Sewell*[b] the Court of Exchequer, composed of Judges on matters of common law cer-

(a) 8 C. B. N. S. 1 & 405. (b) 27 L. J. Ex. 447.

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tainly not tolerant of vagueness of expression, declared the judgment of the Norweigian Court to be of the nature of a judgment *in rem*. One can scarcely be surprised at Sir H. Cairns in his able argument in *Simpson* v. *Fogo*(a) saying—" In *Camnell* v. *Sewell* the Court of Exchequer intimated that the proceedings were ' in the nature of proceedings *in rem*,' whatever that may mean." It is to be observed however that there is good warrant in Roman law for the expression of the learned Judges. *Simpson* v. *Fogo*(b) went upon the principle that, respect being paid to the decrees of foreign tribunals on the principle of amity, those decrees are examinable where the foreign tribunal exhibits a contemptuous disregard of English law applying to the object-matter of its decision. An English tribunal will consider itself exonerated from the correlated obligation of regarding the foreign decree as conclusive. This, therefore, the latest case upon the subject, did nothing to clear up the twilight, a more fruitful parent of error than darkness, in which the decisions and the text writers have involved this matter.

The text writers afford as little instruction as the tribunals. We find that in Mr. Taylor's useful work, of which a fourth edition is now before us, he still quotes the definition of Smith, still shows that it breaks down in its application to numerous and most common cases, and still says that the long course of unsystematic decisions has disabled him from furnishing a better(c). Other able works upon the law of evidence have done nothing to clear up the obscurity. This note of Mr. Smith's is the Alpha and Omega both of tribunals and of text writers.

In this country the opinion prevails that if a judgment declares the status of any body or any thing, the validity of an adoption, the partibility of property, the rule of descent of a particular family, the divisibility of a zemindary or any other question of the same nature, the judgment, being one upon *status*, is conclusive evidence, not only as against the parties to the proceeding but all others. In innumerable cases the grossest fraud and defeat

(a) 1 Hem. and Mil. 211.

(b) Supra.

(c) 2 Taylor on Evid., 1412. 4th Ed.

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of justice have resulted. It is time, therefore, that to the best of our ability we should deal with this question, and if we can relieve it from any portion of the obscurity in which it now rests, we shall gladly suffer the reproach of violating English traditions by making extra-judicial observations. Of the inexpediency of such a course generally we are quite satisfied. In criticising the observations of Mr. Smith we should be sorry to be thought wanting in that respect which every person, whose business it is either to learn or to administer the law of England, must entertain for him. If in this matter he has not exhibited his usual precision, it is because the question before him was not answerable either by reference to English authorities or English writers.

The following are the passages ; in the first he has explicitly, and in the second implicitly, given a definition of a judgment in rem :—" A judgment in rem I conceive to be an adjudication pronounced (as its name indeed denotes) upon the status of some particular subject-matter by a tribunal having competent authority for that purpose. Such an adjudication, being a most solemn declaration from the proper and accredited quarter that the status of the thing adjudicated upon is as declared, precludes all persons from saying that the status of the thing adjudicated upon was not such as declared by the adjudication." " The universal effect of a judgment in rem depends, it is submitted, on this principle, viz., that it is a solemn declaration proceeding from an accredited quarter concerning the *status* of the thing adjudicated upon, *which very declaration operates accordingly upon the status of the thing adjudicated upon* and *ipso facto* renders it such as it is thereby declared to be."(a)

The first objection to the definition is that status is a term at least as ambiguous as that which the author seeks to define. It is sufficient to refer to the elaborate discussion which the matter has received from Mr. Austin.(b) If it is intended that the decision must be upon the whole aggregate of rights and obligations attaching to the subject-matter of the adjudication, there probably never was such a judgment. The word too has an unfortunate ambiguity,

(a) II. Smith's Lea. Cas. 662.

(b) Vols. II and III passim and particularly the notes to Table 2.

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seeing that the object matter of such adjudication is generally a thing, and the right declared a part of the status of some person. Moreover the words "accredited quarter" can only mean a tribunal invested with the power of so declaring status that all persons shall be debarred from disputing the declaration. This really amounts to no more than saying that, whenever a tribunal has the power by its decision of so declaring, the declaration shall bind all persons. It is really no definition at all. It leaves in as thick darkness as before what are the tribunals and what the questions susceptible of their operation. We have only further to remark upon the words "as its name indeed denotes." It is impossible not to suspect that the learned author supposed "in rem" to mean "upon the thing" or "against a thing," and that he was very naturally misled into this opnion by the words really having that meaning when applied to certain modes of procedure in the Courts of Admiralty and Exchequer. If however the learned author had an inkling of the real meaning of this expression his narrowing it to status would be still an error.

The second passage is, as it seems to us, not less inadequate. The words "which very declaration operates accordingly upon the status of the thing adjudicated upon and ipso facto renders it such as it is thereby declared to be," really afford no instruction. The effect of the judgment of every competent Court is to render the person or thing that which it declares him or it to be. The difference between the decree in rem and that inter partes is that the former renders it so as against those not formally parties to the proceeding, while the latter has that effect only as between the parties to the particular suit.

As to the argument from the absurdity of trying an issue when the decree has rendered it such as is declared, it is necessary to observe that the same fallacy lurks here. The only mode in which it renders it such as the Court declares it, is by giving to this particular sort of decree a scope greater than that given to an ordinary res judicata. The argument in its present connection is really none. This was not the case in *Scott* v. *Shearman*[(a)] from which its substance is taken. Before using it, Blackstone, J., had

(a) 2 W. Bl., 977.

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shown that, in the proper understanding of the powers of the Court of Exchequer, the plaintiff was really a party, had an opportunity which he neglected of putting in his claim, and was for ever barred by his laches from questioning, either collaterally or directly, the decision given. We may observe, as we pass on that in *Bernardi* v. *Motteux*,[a] Lord Mansfield puts the binding character of a decision of the Court of Admiralty, one of the least questionable of these decrees in rem, upon the same real or fictitious extension of the parties to the suit. "The principles are clear and admitted—all the world are parties to a sentence of a Court of Admiralty. Here there is a monition published at the *Exchange*, and in other countries at some place of general resort, and any person interested may come in and appeal at any time if there has been no laches." Lord Eldon, in the famous case of *Lothian* v. *Henderson*,[b] shows that the notion that the underwriters could have intervened in the Court of Admiralty to protect their interests under the policy covenanting for neutrality, was a mistake, and he merely said that he would not impugn a practice which had existed for many years and on which many relations of property depended. At this part of the discussion we only quote these cases to show that the Judges of that time saw clearly the principle that the binding effect of these judgments was given to them by an extension of the scope of the res judicata.

The second passage, if properly expounded, amounts merely to saying, "How can you dispute anything declared by the decree, seeing that it declares against you the fact which you dispute?" It is obvious that we have not come any nearer to a knowledge of the requisites of decrees which have this effect. They have barred you because "it is their nature to" is the only reason collectable.

The whole of this strange inconclusiveness in a writer ordinarily famous for the rigid accuracy of his reasoning arises from a misconception of the phrase in rem. The phrase is borrowed by English lawyers, without being understood, from the Civilians. We will first quote two passages, one from the *Institutes of Justinian* (IV. 6-1,) and one from *Gaius*, both quoted and commented upon

(*a*) 2 Doug. 575-80. (*b*) 3 B. & P. 517.

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by *Savigny*:—"Omnium actionum quibus inter alios apud judices arbitrosve de quâcunque re quæritur summa divisio in duo genera deducitur; aut enim in rem sunt aut in personam. Namque agit unus quisque aut cum eo qui ei obligatus est, vel ex contractu vel ex male ficio, quo casu proditæ sunt actiones in personam per quas intendit adversarum ei dare aut facere oportere et aliis quibusdam modis aut cum eo agit qui nullo jure ei obligatus est movet tamen alicui de aliquâ re controversiam quo casu proditæ actiones in rem sunt veluti si rem corporalem possideat quis quam Titius suam esse affirmet, et possessor dominum, se esse dicat: nam si Titius suam esse intendat, in rem actio est. (Gaius IV S. 1, 2, 3.) (Si quæramus) quot genera actionum sint veruis videtur duo esse in rem et in personam. In personam actio est quotiens cum aliquo agimus qui nobis vel ex contractu vel ex delicto obligatus est, id est cum intendimus dare, facere, præstare, oportere. In rem actio est cum aut corporalem rem intendimus nostram esse aut jus aliquod nobis competere. (Sav. 206). We do not quote *Savigny's* rule at the end of the section for determining whether the action is in personam or in rem, because it requires for its understanding a knowledge of a very peculiar principle of Roman procedure. It is sufficient to say that the general distinction between actiones in rem and actiones in personam is that the actio in rem is brought for the vindication of a real right and avails against indeterminate persons as against every detainer of the thing to which the actor asserts a right, but that the actio in personam is brought against persons determinate.

The division really answers generally to the distinction between real rights (jura in rem) and obligations. It is unnecessary here to notice several exceptions to the rule, nearly all of which are stated by *Savigny*.

Our great countryman, Austin, has shown that the words "in rem" in their more extended meaning, applying it analogously to the manner in which the Roman lawyers employed it, would imply adequately and unambiguously the whole class of rights which avail against the world at large. By analogously he means, as they employed it with reference to actions. Austin says (Vol. III, 190):—" The phrase in rem is an expression of frequent occurrence, and

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in all the instances in which it occurs the subject to which it is applied is a something which avails generally 'quod *generatim* in causam aliquam valet.' Take the following instance from the language of the English law. The judgments of Courts of Justice are evidence against parties to the cause and against the determinate persons (succeeding or representing them) who are styled their *privies*. As against persons who are neither parties nor privies, judgments, speaking generally are *not* evidence. But certain judgments are excepted from the general principle and are evidence against *all* persons or at least against the world at large. Accordingly judgments of this species are marked by a peculiar *name*, and that peculiar name is 'judgments in rem.'" And at page 189 he says:—" Although it is applied by the Roman lawyers to a considerable number of cases they always apply it partially. They nowhere use it for the purpose of signifying briefly and unambiguously rights of every description which avail against persons generally." "The large generic expression 'jus in rem' is not to be found in their writings. This expression was devised by the glossators or by the commentators who succeeded them. Seeing that the phrase 'in rem' always imported generality and feeling the need for a term for rights which avail generally, they applied the former to the purpose of marking the latter and talked of 'jura in rem.' And in this instance as in many others they evince a strength of discrimination and a compass of thought which are rarely displayed by the elegant and fastidious scholars who scorn them as scholastic barbarians. In spite of the *ignorance* to which their position condemned them their *reason* was sharpened and invigorated by the prevalent study of their age; by that school logic which the shallow and the flippant despised, but which all who examine it closely and are capable of seeing its purpose regard with intense admiration."

This passage will clear up the whole of the obscurity on the matter. 'In rem' is "quod generatim in causam aliquam valet," and a decree does not avail against those who are not formally parties to it, because it is a decree in rem, but the name "in rem" is given to it because it so prevails. It cannot so prevail because it declares the property that of the actor. This is done in detinue

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and other actions in which there is no pretence of decrees in rem. As we have before shown, too, the decree does not avail because it declares the status, but, by being a decree which is to be conclusive evidence against all the world, it by virtue of that quality in the decree becomes a declaration of perfect ownership where property is in question, or where such a decree so operates upon the status of the person, it fixes that status but simply by making it impossible for any one to resist the decision.

Before referring to the English cases it will be interesting to give a brief view of the manner in which this question is dealt with by the civilians, more especially as it is never dealt with even in the English Courts without an appeal being made, not always very happily, to their authority. Savigny says (S. 301) :—" The right of property and that of succession attribute to him entitled to it an exclusive right, and one available against (opposable to) all. One might therefore be led to believe that the quality of proprietor or heir acknowledged or denied by a judicial decision has the same generality and as absolute an efficacy. Nevertheless it is not so, the essence of the authority of the thing adjudged is the fiction of the verity attributed to the judgment given. By virtue of this fiction the party who gains a cause acquires a right against the party who succumbs, but this right has altogether the nature of an obligation, and hence it cannot be opposed to strangers who might claim the same property or the same succession." After discussing the natural extension of the effect of the rule to successors, whether by title special or universal, he says of restrictions of the non-applicability of the exception :—" These constitute true exceptions to the rule, for they extend the rights and obligations resulting from 'res judicata' to those who have not appeared as parties to the cause, and who do not as successors represent the parties. The practical relation of the rule to the exception may be summed up in these terms. According to the rule the judgment makes 'jus inter partes,' and by virtue of the exception 'jus inter omnes.' One may bring these exceptions to a common point of view by saying that the third party, to whom the effects of 'res judicata' are extended was represented by one of the parties, but this is not a principle abso-

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lutely explaining the reason of all these exceptions; there will still remain certain isolated cases established by positive law; this general point of view shews us the analogy of these different cases and why they are subjected to an exceptional rule."

After saying that it was once a very prevalent opinion that the exception applied to all cases relating to status, he shows that there are in fact only two cases of this kind to which it applies.

(1.) Where there is a question of the legitimacy of a child and of the paternal authority in a case to which the father is a party, the judgment given binds not only the father but all the members of the family, and especially the brothers and sisters of the child.

(2.) The second is a question as to a libertus in a case to which the real patron was a party, but this case has happily lost all interest for us. Where however a judgment had declared a slave a freeman, or a libertus an ingenuous, this did not prevent a third party from claiming to be master or patron. There where three requisites to the judgment binding third parties even in the cases to which the extension applied. (1.) There must have been a *justus contradictor*, that is the father, the patron, or the only person pretending to be patron, must have been a party. (2.) The judgment must have been given after a contentious suit and not by default. (3.) There must have been no collusion between the parties.

The only other decision of any great practical interest is that of cases relating to the law of succession.

(1.) Where there is a cause as to the validity of a testament between the testamentary heir and the heir at law, the judgment will bind all those who derive their rights from the testament as legatees emancipated, &c.

(2.) The second case is no longer of practical application.

We see therefore that the extension of the force of the res judicata to persons not parties to the suit was very carefully guarded, and proceeded upon very intelligible principles, that it was by no means the law that every

decree in an actio in rem was so extendible. Moreover these exceptions were made upon grounds of positive law, and the principle underlying them all was that the nature of the process was such that third persons might be considered as actually parties to it, although not formally so. That this reason has operated elsewhere we have already seen from the judgments of Lord Mansfield and Blackstone, J. In the two most common forms in which these judgments appear that there is some ground for the assumption there is no doubt.

With respect to the jurisdiction of the Admiralty as a Prize Court it is unnecessary to say anything. As a Prize Court its sentences are rather under the law of nations than municipal law. In Instance Causes when proceeding in rem it will be found that the English Admiralty is generally dealing with rights which create a lien upon the ship, and the first process is to seize it. This may be considered fair notice to the owner, if an English ship, that his rights are in question. Where the owner is a foreign one, we find that it is the practice to give notice of the suit to the Consul of the nation of the foreign owner. With respect to the jurisdiction of the Court of Probate as to wills the same observation applies. The death of the testator is a fact of a very marked character, calculated to furnish notice to those related as to his effects, and gives them a fair opportunity of inquiry as to his testacy or intestacy. The same observation may be made of the proceedings of the Exchequer and of the Commissioners of Excise. The process in rem is by seizure of the goods, still affording notice to the owner. A note of Mr. Price in his Exchequer Reports points out the advantage of this proceeding to the Crown.

The same remark applies to decrees for the dissolution of marriage, and singularly enough the Legitimacy Declaration Act makes judgments under it decrees in personam. Settlement cases are manifestly and have always been treated by the Courts as of a very peculiar character. The cases of expulsion by a college visitor (*R.* v. *Grundon, &c.,*)(a) were really questions whether the visitor was a competent authority or not, whether his sentence was examinable. Of

(a) 1 Cowp. 315.

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course there is the point that the sentence was given in evidence upon the action of assault, but it is clear that the defendant was virtually an officer of the Court, and could of course defend himself by showing that an act, which would have been an assault, was not one, because it was an act done in execution of the decree of a competent Court. The same defence would have availed the defendant, if the bailiff of a Small Cause Court executing a decree for a money demand, and the decision is wholly inapplicable to the subject of decrees in rem.

The results seem to be that the rule which makes a judgment conclusive only against the parties and those who claim under them is subject to certain exceptions which are the offspring of positive law, and that the reasons for the exception may be generally stated to be, both in English and Roman law, that the nature of the proceedings, by which there is a fictitious though generally not unjust extension of parties, renders it proper to use the judgment against those not formally parties. That the principle was clearly seen by the great Judge, who is the main author of our commercial law, and who was enabled so to found it because imbued with the elements of that law which is the best guide to jural reason. That the whole confusion upon the matter has arisen from an attempt to evolve, from what is really a mere name, a definition of the object-matter of the decrees, and from a misunderstanding of the meaning of that name. That the rule except in some peculiar cases results from the nature of the proceeding, and that before attempting to apply to this country the doctrine of decrees in rem, a careful consideration must be given to the question whether there are Courts so proceeding. That it will probably be found that there are certain decrees which although it would be most improper to receive as conclusive evidence against third parties ought to be admitted as evidence. In so doing there would be nothing inconsistent with the principles above stated from the Roman law, because those principles apply solely to the absolute bar created by the " exceptio rei judicatæ." That great weight is due to the observation of Bentham, that one great defect of the English Courts is their making no distinction between the reception of such judgments and the rendering of them

conclusive; that the principle should not be, we will not hear it at all, or, if we hear it, we will hear nothing else. This distinction is not unknown to the English law, and it is probable that justice requires a more extented use of it. 1864. December 15. R. A. No. 48 of 1864.

We do not of course profess to have solved these questions. We shall be satisfied if following our illustrious teachers we have, as we hope that we have, pointed out the process by which their solution is to be attempted.

Appeal dismissed.

Appellate Jurisdiction.(a)

Special Appeal No. 333 *of* 1864.

VENKATACHELLAM PILLAY...............*Appellant.*

TIRUMALA CHARY and another...............*Respondents.*

A mortgagee has the right of foreclosure.

The decisions of the Sadr Court, that no mortgagee could ever foreclose the mortgagor's equity of redemption, overruled.

THIS was a special appeal from the decision of W. Hodgson, the Acting Civil Judge of Tinnevelly, in Appeal Suit No. 260 of 1863, confirming the Decree of the Principal Sadr Amín's Court of Tinnevelly, in Original Suit No. 24 of 1863. 1864. December 20. S. A. No. 333 of 1864.

Mayne, for the special appellant, the plaintiff.

Srínivasácháry, for the first special respondent, the first defendant.

The Court delivered the following

JUDGMENT:—In this suit the plaintiff sued to have an alleged conditional sale declared absolute.

The lower Courts, as to the only parcel of land in issue in this suit, declined to enforce what they termed a penalty, and on the grounds upon which this special appeal has been put it cannot be sustained; for, so far as the present land is concerned, the document did not create a conditional sale but a mortgage. It is plain, however, that the plaintiff was quite entitled to sue for the foreclosure of his mortgage and to the relief incident to that suit.

(a) Present: Frere and Holloway, J.J.

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Within the last 8 years of its existence a doctrine that no mortgagee could ever foreclose grew up in the late Sadr Court. Many decrees of foreclosure had, previously to that period, been passed by the Sadr Court itself. There exists no reason whatever why the mortgagee should be deprived of the remedy given by his contract, and the contract in this case is substantially a mortgage in the English form.

At the hearing we thought that an account would be necessary, but from the non-mention of mesne profits on either side we must take it that, as is very common, the produce was to go in extinction of interest. The property is clearly in the possession of the mortgagee, and this will greatly simplify the decree.

Upon the defendant paying to the plaintiff the sum due under the document B within three months after the receipt of this decree by the Civil Court of Madura, let the plaintiff re-convey and deliver to defendants the three mortgaged shares in question in this appeal; but in default of defendants paying to plaintiff the said sum, the defendants are thenceforth to stand absolutely debarred and foreclosed from all equity of redemption of in and to the said mortgaged three shares.

Original Jurisdiction.[a]

Regular Appeal No. 49 *of* 1864.

VENGAMA NAIKAR........................*Appellant.*

RAGHAVA CHARY and 2 others............*Respondents.*

In a suit for a malicious prosecution it is not necessary to prove that the evidence of the defendant upon the criminal charge was false. Plaintiff is entitled and bound to show that the prosecution was malicious and without reasonable and probable cause, and if want of reasonable and probable cause be shown malice may generally be inferred.

THIS was a regular appeal from the decree of A. W. Phillips, the Civil Judge of Chingleput, in Original Suit No. 23 of 1861. 1864. *December* 22. *R. A. No.* 49 *of* 1864.

Rangaiya Naidu, for the appellant, the plaintiff.

Srínivasachâry, for the second and third respondents, the second and third defendants.

The Court made the following

ORDER.—The plaintiff sued for damages on account of a malicious prosecution.

The defendant denied that he charged the plaintiff with anything.

The Civil Judge's judgment is in the following words :—

"First defendant seems to have charged plaintiff on suspicion among others with having been concerned in a robbery which took place at his (first defendant's) house, but as plaintiff had a few days before the robbery threatened him, he (first defendant) had, it appears, good grounds for suspecting. He (first defendant) never deposed to having *seen* plaintiff at the commission of the robbery, nor did he depose positively to the articles found in plaintiff's house being his (first defendant's). I think, therefore, there can be no action of damages sustained against him. Again, though the second and third defendants gave evidence in that case to the effect that certain articles found in plaintiff's house were first defendant's, and though there is every reason to believe their evidence is false,—its falseness has not been established, and I cannot uphold plaintiff's claim against them any more than against first defendant."

[a] Present : Frere and Holloway, J. J.

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The Civil Judge has dismissed the suit because the falsity of the defendant's evidence in the criminal case, although very probable, was not established. The Civil Judge, by his course of proceeding, gave the plaintiff no opportunity of proving anything. The plaintiff will have a good cause of action if the charge was made maliciously and without reasonable and probable cause. From the absence of reasonable and probable cause, however, an inference of the existence of malice may generally be drawn.

The Civil Judge must try the issue,—

Whether the prosecution of plaintiff for gang robbery was without reasonable and probable cause; and for this purpose each party must of course be permitted to adduce evidence.

Should the Civil Judge be of opinion that the prosecution was malicious and without reasonable and probable cause, it will be his duty to award such damages as the circumstances of the case and of the parties render reasonable.

It is accordingly ordered that the finding on the above issue, together with the evidence and, if any, the award of damages, be returned to this Court within one month from the date of receiving this order.

Issue directed.

Appellate Jurisdiction.[a]

Special Appeal No. 297 *of* 1864.

MUTTUSAMY JAGAVI'RA YETTAPA NAIKAR........*Appellant.*
VENKATASUBHA YETTIA..........................*Respondent.*

The illegitimate son of a Sudra by a concubine, not being a female slave, is entitled to maintenance according to Hindú Law.

THIS was a special appeal from the decision of W. Hodgson, the Acting Civil Judge of Tinnevelly, in Appeal Suit No. 328 of 1863, reversing the decree of the Principal Sadr Amín's Court of Tinnevelly in Original Suit No. 65 of 1863. 1865. *January* 3. *S. A. No.* 297 *of* 1864.

Advocate General, Mayne, and Runghácháry, for the appellant, the defendant.

Rájágópálácharlu, for the respondent, the plaintiff.

The Court delivered the following

JUDGMENT :—This is a special appeal from a decree of the Civil Judge of Tinnevelly awarding Rupees 8,400 per annum to the plaintiff below, found to be the son of the late zemindar by a concubine.

The grounds of appeal urged by the Advocate General and Mr. Mayne were :

(1.) That there was no appearance of any other property than that of the zemindary, and that the fastening of a life-rent upon that was illegal.

(2.) That the concubine of whom the plaintiff was born, was not a slave girl, and that the right to maintenance was confined to those born of the "familia" of deceased.

(3.) That in point of law the amount awarded was excessive.

The fact that the judgment of the Civil Judge indicates the possession of private property by the zemindar in possession, who has inherited the whole property of plaintiff's father, renders this objection, even if tenable, wholly

(a) Present : Frere and Holloway, J.J.

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inapplicable. We will therefore only observe that in the Case at I. H. C. 349, care was taken to leave untouched the question, whether the right of those otherwise entitled to maintenance would be prejudiced by the circumstance of the property from which the maintenance was to come being a zemindary. The question really is whether this son, not being the child of a female slave, is entitled to maintenance. Mr. Mayne argued that, being the son of a Sudra, he was perhaps entitled to inherit although illegitimate, but that this was not his claim. A passage in Sir W. Macnaghten's Hindú Law, apparently quoted with approbation by Sir E. Ryan (VII Moo. I. A. 49) who, as an ex-Chief Justice of Bengal, not unnaturally attaches very great weight to Macnaghten, distinguishes between the unborn son of a slave and one born of another woman. After showing the sharers which would be taken by the Sudra's illegitimate son in various cases, Macnaghten says, " If the woman were not his female slave the son begotten on her by him would have no right to the inheritance, but only a claim to maintenance." (Vol. II., p. 15, note.)

In his first volume, at page 18, the learned author states the same doctrine and quotes in its support the Mitacshara, Cap. 1, Sec. XII, which declares the circumstances in which the son of a Sudra by a female slave is to inherit. The word " female slave" is used throughout the passage, but the not very delicate discussion in Colebrooke's Digest (Vol. II., 221, &c.) of the circumstances and employments which, according to some commentators, distinguish slavery from mere servitude, seems to show that no peculiar weight ought to be attached to the word " slave." Again, if the Sanscrit word in the Mitacshara is दासी as we were informed at the bar that it is, a reference to any dictionary will show that the word means " a female of the Sudra tribe, the wife of a fisherman and a concubine." Even if it were दास as the masculine noun means equally " a fisherman" and " a servant," there seems no reason for supposing that the feminine does not mean a female servant, although " female slave" is the only meaning given to it by Wilson in his dictionary. Without a careful collation of the original it would be difficult to determine this point. If the restriction is really laid down by the authorities, it is pro-

bably on account of the difficulty of tracing sonship where the woman is not absolutely under the reputed father's power.

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We may again advert, as explaining the apparent narrowness of the definition, to the principles on which the status of a slave was held in Hindú Law to follow upon certain occupations and conditions. The son imperfectly adopted was held to be in the condition of a slave, yet a person so imperfectly affiliated would unquestionably be entitled to maintenance. Assuming him to be excluded from the inheritance, it seems impossible to say that he would not be entitled to maintenance. We find from *Murdun Singh* v. *Purhulad Singh* (VII Moo. I. A. 18) that the illegitimate son, even of a man of the regenerate tribes, is entitled to maintenance. It cannot be disputed, as indeed it is in that case as throughout all the authorities admitted, that the illegitimate son of a Sudra stands in this particular in a better condition than one of a twice-born man.

The right to maintenance, too, follows upon the exclusion from inheritance, and we are unable to see that there would be any justice in upholding the argument used at the bar that he may have been entitled to inherit, but, as he has lost the inheritance, he has no right to be maintained. For the purpose of the present case it is sufficient to say that the plaintiff is within the precise words of the rule laid down by Macnaghten. Whether reason and legal analogies will not show that the rule is too much narrowed is open to question. As to the amount of maintenance, nothing has been urged to justify us in disturbing the decision of the Lower Court, or to show that in this case the amount of maintenance is a question of law at all. This special appeal is dismissed with costs.

Appeal dismissed.

Original Jurisdiction.(a)

Original Suit No. 214 *of* 1864.

STEPHEN CLARK and others *against* RUTHNAVALOO CHETTI.

Secs. 121 and 195 of the Code of Civil Procedure (Act VIII of 1859) have not the effect of enlarging the right of set off.

In a suit against the acceptor to recover the amount due upon several bills of exchange, the defendant sought to set off a claim for unliquidated damages unconnected with the bills of exchange. *Held* that defendant has no right to set off his claim against the debt due to the plaintiffs.

Semble the right of set off will be found to exist not only in cases of mutual debts and credits, but also where cross demands arise out of the same transaction or are so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant be driven to a cross suit.

1865. *January* 5. *O. S. No.* 214 *of* 1864.

THIS suit was brought to recover the sum of Rupees 81,449-11-7, amount of principal and interest due by defendant to plaintiffs on eighteen Bills of Exchange drawn by Messrs. Palmer and Co., of London, on the defendant, at Madras, and payable to the plaintiffs, under the name, style, and firm, of Stephen Clark and Co., and accepted by the defendant.

The defendant, in his written statement, averred that plaintiffs were merely the agents of Messrs. Palmer and Co., for the purpose of collecting the acceptances sued upon, that the balance due in respect of the acceptances was Rupees 3,000 or thereabouts, and that defendant had claims against Messrs. Palmer and Co. far exceeding the said sum of Rupees 3,000 on account of loss which had resulted by reason of goods which had been shipped by them to defendant having been sea damaged, such loss not being recoverable under the insurances effected by Messrs. Palmer and Co., contrary to the express instructions of the defendant. Messrs. Palmer and Co. had stopped payment.

Upon the settlement of issues the plaintiffs affirmed and the defendant denied that the goods were shipped and the insurances effected by Messrs. Palmer and Co., expressly in pursuance of the instructions of the defendant.

The following issue was settled by Mr. Justice Bittleston :—

(a) Present: Scotland, C. J., and Bittleston, J.

Whether the defendant is entitled to set off against the plaintiff's claim in this suit the sum of Rupees 8,647-14-8, or any other sum, with interest, on account of any loss sustained by sea damage to the said goods, as is by the said defendant alleged. 1865. *January* 5. *O. S. No.* 214 *of* 1864.

Mayne, for the plaintiffs.

The Advocate General, for the defendant.

It was agreed to take the opinion of the Court first upon the right of set off asserted by the defendant.

The cases cited are fully noticed in the following judgment of the Court which was this day delivered by 1865. *January* 10.

SCOTLAND, C. J. :—The question which we have been called upon to determine in this case is, whether the defendant, being confessedly indebted to the plaintiffs upon the Bills of Exchange mentioned in the plaint, is entitled, in this suit, to insist that a claim, made by him for damages sustained by reason of the neglect of Palmer and Co. to insure certain goods according to the instructions of the defendant, should be investigated, and that the amount, if any, found due to him on account of that claim should be set off against the plaintiff's demand.

We must assume, for the purpose of this preliminary question, that the plaintiffs and Palmer and Co. are identical, and that there is a bonâ fide claim by the defendant against Palmer and Co.

But it is conceded, and could not be denied, that that claim, being one for unliquidated damages, would not be the subject of a set off in an English Court of Law, and if this had been an action on the plea side of the late Supreme Court the defendant's claim certainly could not have been pleaded, either by way of set off, or by way of avoiding circuity of action.

In *Charles* v. *Alton*,(a) which was an action for repayment of one-third of the freight paid in advance, after the loss of ship and cargo, the defendant pleaded, *in avoidance of circuity of action*, that the one-third freight was a loss to be insured against by the plaintiff, but that he insured so negligently that the insurance was useless, and that by such negligence plaintiff became liable to the defendant for the

(a) 23 L. J. C. P., 197.

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same amount which he claimed in the action. But the Court held the plea bad, for the jury, in assessing the damages for the negligence, might give more or less than the one-third freight, and the rule of law, as to avoiding circuity of action, which requires such a plea to show that the sum to which the defendant is entitled is the same as the plaintiff claims, was not complied with: Maule, J., observing that the amount of damages could not be treated as liquidated.

We refer to that case because the claim made by the defendant in the present suit is of the same kind, viz., a claim for damages on account of insufficient insurance and for the purpose of meeting the passage in *Sedgwick on Damages*, p. 340, from which an inference might be drawn that such a claim did not sound in damages merely.

The present suit, however, cannot be determined as if it were an action on the plea side of the late Supreme Court. It is a suit instituted in this Court according to the provisions of the Civil Procedure Code, and we are directed by the Letters Patent establishing this Court (Cl. 18) to apply to each case coming before it in the exercise of its ordinary original civil jurisdiction such law or equity as would have been applied to the same by the late Supreme Court. We must see, therefore, whether in the late Supreme Court, on its Equity side, the defendant could have insisted upon a right to set off his claim for damages against the debt due to the plaintiff on the Bills of Exchange.

This could only have been done by filing a bill setting up the cross claim and praying that the proceedings at law upon the bills might be stayed and the debt decreed; or to pay only the balance, after ascertaining and deducting the amount of the cross claim. But this prayer, we are of opinion, could not have been granted. We find no authority for the interference of a Court of Equity in such a case, but much against it.

In *Whittaker* v. *Rush*[a] an early case on the subject, Sir Thomas Clarke, Master of the Rolls, after referring to the Roman Law of Compensation, says:—" Equity took it up but with limitations and restrictions and required that

(a) Ambler, 407.

there should be a connection between the demands." Again in *Harvey* v. *Wood*[(a)] it was held that where both debts are legal no set off can be allowed in equity without special circumstances; and there are no special circumstances in this case beyond the mere existence of cross demands. Now the mere existence of cross demands has never been deemed a sufficient ground for the allowance of a set off in equity. If it had the many instances in which a set off has been disallowed could not have occurred. 1865. *January* 10.

In *Ex parte Blagden*,[(b)] which was a case of bankruptcy, it was held that a debt from a bankrupt to a married woman, *dum sola*, could not be set off against a debt from her husband to the bankrupt, and also that the claim of the bankrupt's assignees upon a policy made before the bankruptcy, but on account of a loss after the bankruptcy, could not be set off against a debt from the bankrupt. And the Lord Chancellor said:—"There is a difference upon set off in equity and at law. In equity it prevailed long before the Statute. It must be a strict set off at law or a case of mutual debt or credit."

So in *James* v. *Kinnier*[(c)] the set off was allowed on the ground that there was a clear mutual credit between the parties, and it was stated by the Lord Chancellor, and not contested by the Counsel, that either mutual debts or mutual credits would sustain a set off in equity.

In *Rawson* v. *Samuel*,[(d)] an action had been brought by the defendant against the plaintiff for damages for refusing to accept bills, and it being made to appear that there was a complicated account between the parties, the Vice-Chancellor had refused to restrain the trial of the action but had restrained the execution, if a verdict should be found for the plaintiff, in order that the account might be taken in equity. But the Lord Chancellor, upon appeal, held that the existence of a long and complicated account was not a ground for staying the execution, and in the course of his judgment he made the following observations on the doctrine of equitable set off:—"It will be found that this equitable set off exists in cases where the party seeking the benefit of it can show some equitable ground for being protected against

(a) 5 Mad., 459.
(b) 1 Ves., 465.
(c) 5 Vesey, 110.
(d) Cr. and Phil., 161.

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his adversary's demand. The mere existence of cross demands is not sufficient. In the present case there are not even cross demands, as it cannot be assumed that the balance of the account will be found to be in favor of the defendants at law. Is there, then, any equity in preventing a party who has recoverd damages at law from receiving them because he may be found to be indebted upon the balance of an unsettled account to the party against whom the damages have been recovered ?" We may add to this that as regards the case of *Ex parte Stephens*, Lord Eldon himself rested that judgment on the ground of fraud, in his judgment in *Ex parte Blagden.*

Again in *Freeman* v. *Lomas*, 20 L. J. Ch. 564, the suit being by assignees of a bankrupt for payment of a legacy, the defendant, who was the executor and residuary legatee, claimed to set off moneys which he had paid as surety for the legatee, and Turner, V. C., disallowed the claim. He points out (as the Lord Chancellor does in *Ex parte Blagden)* that cases of equitable set off had arisen before the Statutes, and that the origin of the equitable rule was to be traced to the Roman Law of Compensation, and he adds:—"I believe upon examining the authorities it will be found that, except upon special circumstances, Courts of Equity have never allowed cross demands existing in different rights to be set the one against the other"—in which respect the English follows the Roman law.

Lastly, there is the case of *Steenson* v. *Hall*,(a) in which the Court of Exchequer expressly decided that even by way of equitable defence such a claim as is made by the defendant in this case could not be set off, and that distinctly on the ground that according to the ascertained rules of the Court of Chancery a perpetual injunction would not have been granted in such a case. We may also refer to Mr. Justice Story's Chapter on Equitable set off, where he says:—"It is true that equity generally follows the law, as to set off, but it is with limitations and restrictions. If there is no connection between the demands then the rule is as at law. But if there is a connection between the demands equity acts upon it and allows a set off under

(a) 26 L. I. Exch. 212.

particular circumstances."[a] He then refers to the cases of mutual credit, saying that, independently of the Statutes, Courts of Equity give relief in all cases where, though there are mutual and independent debts, yet there is a mutual credit founded at the time on the existence of some debts due by the crediting party to the others. By mutual credit in the sense in which the terms are here used we are to understand a knowledge on both sides of an existing debt due to one party and a credit by the other party founded on and trusting to such debt as a means of discharging it. See as to mutual credit the observations of the Privy Council in *Young* v. *The Bank of Bengal*, 1 Moore I. A. 87. 1865. *January* 10.

But the present is clearly not a case of mutual credit, and, unless it can be shown that the defendant's claim of set off rests upon some equity which impeaches the plaintiff's legal rights to recover his demand, there is no ground for allowing the set off. Now the claims here are wholly unconnected and the case is in that respect, therefore, distinguishable from *Beasley* v. *Darcy*[b] and the other cases commented upon by the Lord Chancellor in *Ranson* v. *Samuel* before referred.[c] The two most recent cases in equity in which a set off has been allowed are the cases of *Cavendish* v. *Graves*[d] and *Jenner* v. *Morris*[e] both of which rest upon distinct equitable grounds. In the former, bankers had assigned securities given by a customer indebted to them without giving him any notice of the assignment. The bankers having become bankrupt and the assignees of the securities having brought actions in the names of the bankers against the customer, the latter filed his bill against the assignees of the securities, and in that suit it was held that the plaintiff was entitled to set off the moneys due to him on his running account against the debts secured; the assignees being in no better position than the bankers would have been, and clearly, as between the banker and the customer, there would have been a set off at law as well as in equity. So in *Jenner* v. *Morris*, where it was held that a debtor who had advanced

(*a*) Eq. Jur., Sec. 1434.
(*b*) 2 Sch. and Lef., 403 n.
(*c*) Supra.
(*d*) 27 L. J. Chan., 314.
(*e*) 30 L. J. Chan., 361.

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moneys for necessaries supplied to the deserted wife of the creditor was entitled in equity to set off such moneys against the creditor's legal demand. The ground of the decision was that the debtor making the advance stood in the same position in equity as the trades-people who furnished the necessaries and was entitled to the same remedies. These two cases, we think, fall within the rule expressed by Lord Chancellor Cottenham in *Clark* v. *Court*.(a)

It was further argued before us that, upon general principles of convenience, and also upon the language of the Civil Procedure Code, we ought in this and in every suit to investigate and dispose of every matter in dispute between the same parties brought to the notice of the Court. But we cannot agree that convenience requires or is even consistent with any such general rule as that, nor has any such rule been adopted, so far as we are aware, into any system of jurisprudence. We may here quote the language of Sir J. Jekyl, to be found in a note by Mr. Blunt at page 408 of the 1st Volume of Ambler's Reports. He says:—"The rule of doing equity and having equity is to be understood of particular equities and where they relate to one and the same thing; and a special or particular equity cannot be barred by a general equity, as if to a demand of a debt the defendant should say the other has injured him in a trespass or on other accounts foreign to the thing in demand, for these would breed great confusion." Certainly the Roman Law of Compensation was restricted within narrower limits than is here contended for. Referring to the *Code*, Lib. IV, Tit. 31, it will be found that the Judges are cautioned not to be too ready to admit claims by way of set off, and not only the inconvenience but the injustice is pointed out of subjecting a party having a clear debt to a lengthened investigation in the suit upon a knotty and doubtful claim; and the same passage points out that the "causa ex qua compensatur liquida sit et non multis ambagibus innodata." So it is said by Mr. Chancellor Kent in *Duncan* v. *Lyon*(b) referring to the general rules in the allowance of compensation or set off by the Civil law:—" To authorise a set off the debts must be between the parties in their own right, and must be of the

(a) Cr. and Ph., 154. (b) 3 Johns, Ch. Rep., 359.

same kind or quality and be clearly ascertained or liquidated; they must be certain and determinate debts." And Mr. Justice Story uses similar language. 1865. January 10.

Then, is there any provision of the Indian Civil Procedure Code (Act VIII of 1859) which shows the intention of the legislature to enlarge in any way the right of set off? The only sections directly bearing upon the point are Secs. 121 and 195. The former section provides that if in a suit for debt the defendant desire to set off against the claim of the plaintiff the amount of any debt due to him from the plaintiff he shall tender a written statement containing the particulars of his demand and the Court shall thereupon inquire into the same. This enactment, in strictness, applies only to cross debts, the language not being more comprehensive than that of the English Statutes of set off, 2 Geo. II, Cap. 22, and 8 Geo. II, Cap. 24, and it is to be observed, in considering to what cases the section was intended to apply, that whilst Sec. 9 provides for the separate trial of several causes of action joined in one suit, if the Court consider that they cannot conveniently be tried together, yet neither in Sec. 121 nor elsewhere in the code is there any provision for any separate trial of the questions that may be raised upon a claim of set off, and those questions may (as in this case) be numerous. As to Sec. 195, we do not think that any additional effect can be given to the word "demand." It appears to be used in the sense of debt, in which sense it is also used in Sec. 121.

These, however, are provisions of a code regulating procedure only, and, whilst we think that the language used has not the effect of enlarging the right of set off, we ought at the same time to say that, according to our present opinion, the Procedure Code was not intended to take away any right of set off, whether legal or equitable, which parties would have had independently of its provisions. It seems to us that the right of set off will be found to exist not only in cases of mutual debts and credits, but also where the cross demands arise out of one and the same transaction, or are so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant be driven to a cross suit. In the present case the

1865. January 10. defendant's claim appears to us not to come within the rule by which this Court is governed, and he must be left to seek in a cross suit any damages to which he can prove himself entitled. The result is that there must be a decree for the plaintiff for the amount due upon the Bills of Exchange.

Appellate Jurisdiction.(a)

Referred Case No. 22 *of* 1864.

SAMINATHA PILLAY AND CO. *against* VARISAI MAHOMED RAVATTAN.

Mere casual presence, or even residence for a temporary purpose, without the intention of remaining, is not "dwelling" within the jurisdiction of a Small Cause Court within the meaning of Section IV of Act XLII of 1860.

A person resided at Coimbatore, but had some cultivation within the local jurisdiction of Ootacamund, to which he came to answer another demand against him.

Held, that he did not "dwell" within the jurisdiction of the Ootacamund Small Cause Court.

1865. January 9. R. C. No. 22 of 1864.

THIS was a case referred for the opinion of the High Court by L. C. Innes, the Civil Judge of Ootacamund, in Original Suit No. 213 of 1864.

No Counsel were instructed.

The Court delivered the following

JUDGMENT:—The question is whether a person who resides in Coimbatore, but has some cultivation within the jurisdiction of the Court at Ootacamund, and who came within the local jurisdiction to answer another demand against him, can be said to "dwell" within the jurisdiction of the Court at Ootacamund.

The English Courts have had to consider the meaning of the word "dwell" in the construction of Sections 60 and 128 of the County Court Act. In *Dunston* v. *Paterson*(b) a compulsory and temporary residence without the intention of remaining was held not to be a "dwelling," and in *Kerr* v. *Haynes*(c) a person who had a place of business in London and resorted to it, sometimes twice, sometimes four times a

(a) Present: Scotland, C. J., and Holloway, J.

(b) 28 Law Jour. C. P. 97.

(c) 29 L. J. Q. B. 70.

week, but whose family and servants and fixed residence were at Margate, was held to dwell at Margate and not to dwell in London. These and many other cases, which are all collected in *Adams* v. *G. Western Railway Company*(a) show that mere casual presence or even residence for a temporary purpose within the jurisdiction, without the intention of remaining, is not "dwelling" within the meaning of the Small Cause Court Act. They show also that the word "dwelling" is to be taken in its popular sense. Like many other words it is however more easily understood than defined. On the facts here stated it is quite clear that the defendant was absent from his home when at Ootacamund, and that when he returned to Coimbatore he would be at home, i. e., at his dwelling place. It is quite clear that the small cause side of the Ootacamund Court had no jurisdiction.

1865. *January* 9. *R. C. No.* 22 *of* 1864.

(a) 6. Hurl. and N. 404.

Appellate Jurisdiction.(a)

Civil Petition No. 136 *of* 1864.

DARBHA VENKATA SASTRI *against* VURELLA GANGAIA and 2 others.

Ex parte VURELLA GANGAIA, FIRST COUNTER-PETITIONER.

Execution cannot be issued upon a razinama unless the terms of it are embodied in a decree of the Court.

THIS was a petition against an order of C. Collett, the Civil Judge of Vizagapatam, dated the 11th March 1864.

1865. *January* 9. *C. P. No.* 136 *of* 1864.

Sloan, for the petitioner.

Ranghácháry, for the second and third counter-petitioners.

JUDGMENT:—In this case execution has issued upon a razinama, by which the parties withdrew a suit, although the razinama was never embodied in a decree of the Court.

It is quite clear that such a razinama could not be executed under the Civil Procedure Code, and, the matter being one of procedure, it seems that the procedure at the

(a) Present: Scotland, C. J., and Holloway, J.

1865. January 9. C. P. No. 186 of 1864.

period of the application must govern. We are quite aware that some Courts under the old system were in the habit of executing agreements of this character, although not embodied in decrees. There were, however, many Courts which wholly refused to do so, unless their terms had been embodied in the decree of the Court to which the agreement was presented. Nothing was more common than a decree in the form:—"The terms of the razinama appearing unobjectionable, it is resolved to make a decree according to its terms." In many instances too the Courts refused to do so, because the parties had entered therein complex provisions and stipulations, not settling merely the matter at issue, but many others, and having for their object too frequently the annoyance of third parties. The old law contained no provision of which we are aware for the execution of any thing but decrees of Court, and Circular Order 115 of the late Sadr Court seems to contemplate such decrees being passed.

If, therefore, the Civil Procedure Code was not in force, as we have no reason to believe, at the date of presentation of the original petition, we should still be of opinion that the enforcement of a mere contract between the parties as a decree of Court was irregular. The decisions of the Lower Courts will be reversed.

It is accordingly ordered that the orders of the Civil Court and Court of First Instance be and the same hereby are reversed.

Appellate Jurisdiction.(a)

Regular Appeal No. 24 of 1864.

A. KRISTNA ROW and another..................*Appellants.*

H. HACHAPA SUGAPA..............................*Respondent.*

Where a suit was brought upon a bond to secure the payment of principal and interest, and the relief sought was that payment of principal and interest may be enforced, both as a simple contract liability and as a debt secured by a collateral mortgage of immoveable property. *Held* that the suit was one for the recovery of an interest in land under Sec. 1, Clause 12 of Act XIV of 1859, and was not barred for 12 years.

Although part payment is not sufficient to give a new period of limitation without a written acknowledgment of the debt, within Sec. 4 of Act XIV of 1859, that section does not require that the writing should express in terms a direct admission that the debt or part thereof is due. It is left to the Court to decide in each case whether the writing, reasonably construed, contains a sufficient admission that the debt or part of it is due.

THIS was a regular appeal from the decree of J. Ratliff, the Civil Judge of Bellary, in Original Suit No. 36 of 1863. 1865. January 9. R. A. No. 24 of 1864.

The Advocate General, for the appellants, the defendants.

Mayne, for the respondent, the plaintiff.

The Court passed the following

JUDGMENT:—This is a suit upon a registered bond, dated the 25th January 1854, and purporting to secure the payment of Rupees 1,510 with interest within 6 months from the date, and the relief sought is in effect that the amount due for principal and interest may be enforced, both as a simple contract liability on the part of the defendants, and as a debt secured by a collateral mortgage charge on certain immoveable property. In answer the defendants, admitting the execution of the bond and that it had been registered, have pleaded that the suit is barred by the Limitation Act. They also set up that the bond was obtained from them fraudulently and without consideration; and that the memorandum of part payment which appears upon the bond is a forgery. The Civil Court, treating the case as one of simple contract liability only,

(a) Present: Scotland, C. J., and Frere, J.

1865. January 9. R. A. No. 24 of 1864.

has decreed payment of the debt claimed against the defendants personally, without however receiving the oral evidence offered at the hearing to show that the bond had been obtained fraudulently and without consideration.

It is now contended, upon appeal, by the defendants that the Civil Court has come to a wrong decision, on the grounds that the Limitation Act is a bar to the suit, but if not, that the oral evidence offered by the defendants had been improperly excluded from consideration. We are of opinion that the Civil Court rightly decided against the defendants upon the plea that the suit was barred by lapse of time: but upon grounds very different from those stated in the judgment of the Civil Judge. His decision appears to have been based entirely upon the fact of the production and detention of the bond as evidence in another pending suit from February 1860 to January 1863, and if no more than this had appeared in the case, we should have considered the decision clearly wrong and reversed the decree.

The bond sued upon is not simply a personal contract for the payment of the principal debt with interest. It contains also an express contract of hypothecation, pledging or mortgaging the defendants' share in certain houses and shops, which are described in the bond, as a security for the full discharge of the principal debt and interest. There can be no doubt that, by this incidental contract, the debt of the defendants was made a charge upon the property, and that the plaintiff thereby acquired an interest in it which he might enforce so long as any portion of the debt remained unpaid; and one part of the relief prayed in the suit is the enforcing of the plaintiff's claim upon the houses and shops. This, therefore, is, we think, a suit for the recovery of an interest in immoveable property within the meaning of the Limitation Act 14 of 1859, Section 1, Clause 12; and, having been instituted within 12 years from the time when the debt became due, the plaintiff is not barred from recovering against the property mortgaged.

But there is nothing before us by which we can form any judgment as to the value of the property, and it may be much less than the debt due. It becomes necessary therefore to consider further, whether the Limitation Act is a bar to the right to recover in the suit so far as it seeks to

enforce payment of the amount claimed as a simple bond debt; and there is no doubt that, so far, the suit is barred as more than 6 years had elapsed since the bond became payable, unless the memorandum of part payment endorsed upon the bond had the effect of extending the period of limitation. In two recent cases before the High Court, reported at pages 79 and 84 of the 2nd Vol., M. H. C. Reports, it has been decided, and we think on further consideration rightly decided, that part payment is not of itself sufficient to prevent a debt from being barred by lapse of the period of limitation provided by the Act. Here the question is whether the memorandum accompanying the part payment, and which as it happens purports to be signed by the first defendant, the person making the alleged payment, is a sufficient written acknowledgment of the debt to give a new period of limitation as against him under Section 4 of the Act. The memorandum, accurately translated, is this :—" Payment on account of this : up to the 21st day of November of the year of Christ 1858 corresponding to Sunday, &c., the interest was paid in full and on account of the principal Rupees $107\frac{1}{2}\frac{3}{16}$, in letters one hundred and seven Rupees and eleven Annas. The signature of Kristna Row Atacoor." Now the enactment in Section 4 does not, we think, render it necessary that the writing should express in terms a direct admission that the debt or a part thereof is due. The section requires the greater certainty of a written acknowledgment, but no particular form of words. It is left for the Court to decide in each case whether the writing, reasonably construed, contains a sufficient admission that the debt or a part thereof is due. Here the writing purports to be a memorandum of the payments made on account of the bond debt. It begins " payment on account of this,"and then states in terms that *up to the 21st November* 1858 (the day it was signed) interest had been paid in full and Rupees 107-11-0 on account of the principal. Giving to the expressions used their ordinary meaning, we think the memorandum, if genuine, clearly implies an admission that the debt due upon the bond at the time the first defendant signed the memorandum was the amount of the principal less Rupees 107-11-0, the sum stated to have been paid. There is, therefore, a written acknowledgment, by which the first defendant has admitted a debt to be due on the bond, and it con-

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tains no qualifying expressions as to payment. This, we are of opinion, is sufficient to satisfy the 4th Section of the Act and to continue the liability of the 1st defendant as a simple bond debtor. Our decision upon the point is consistent with the principle acted upon in *Lechmere* v. *Fletcher*(a) *Williams* v. *Griffiths*(b) and the other English decisions as to written acknowledgments since the leading case of *Tanner* v. *Smart*(c); but in saying this it is not to be understood that we consider that any acknowledgment, which did not come within the rule laid down in those decisions, would be insufficient to satisfy the 4th Section of the Act. The present decision proceeds upon the ground that the writing contains an unqualified admission of the debt : but we do not mean in any way to say that a distinct admission, by an acknowledgment in writing of a debt due and owing would not satisfy the section, if it were accompanied with any expressions which did not warrant the inference of a promise to pay. At present we incline to think that such an admission would suffice, though from expressions as to payment a promise to pay on request would not, according to the English cases, be implied.'

The remaining objection for consideration is the alleged improper rejection of the defendant's evidence. The Civil Judge, it appears, did refuse to receive the evidence of certain witnesses on the ground that oral evidence was inadmissible, and there is no doubt he was wrong. But it seems that the defendant's Vakeel afterwards handed in a memorandum stating that he no longer desired to have the evidence of witnesses taken, and this, it was urged, precluded the appellants from objecting to the ruling of the Civil Judge. We thought it right, after hearing the arguments, to call for a statement of the circumstances connected with the memorandum, which has been furnished. From that it appears that the memorandum was handed in after the close of the final hearing, and that on the next day, when judgment was about to be given, one of the defendants personally handed to the Judge a petition repudiating his Vakeel's proceeding. These and the other circum-

(a) 1 Cr. and Mees., 623.
(b) 3 Exch. Rep., 342.
(c) 6 B. and C., 603.

stances stated lead us to the conclusion that the defendants cannot properly or safely be bound by the memorandum put in by the Vakeel.

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The result of our judgment is that the suit must be remanded in order that the defendants' evidence may be received, and the questions of fact in the case fully heard and determined. Should the bond be upheld the decree in the suit ought to be for the sale of the mortgaged property and payment of the amount of the principal and interest found to be due out of the sale proceeds, unless within a reasonable time to be named the defendants pay such amount; and also (if the endorsement upon the bond be genuine) for the payment by the first defendant of any balance which may remain unsatisfied by the sale proceeds.

Suit remanded.

Appellate Jurisdiction.(a)

Civil Petition No. 209 *of* 1864.

SIVARAJADHANI NILAKANTHAM PILLAY.....*Petitioner.*

KUPPAGANTULU RAMIAH PANTULU.......*Counter-Petitioner.*

Where a defendant appears in person or by pleader, the fact that the defendant is not prepared to put in a written statement does not warrant the trial of a suit ex parte.

THIS was a petition against an order of E. P. Ford, the Acting Civil Judge of Chicacole, dated 19th July 1864.

1865. *January* 10. *C. P. No* 209 *of* 1864.

Sloan, for the petitioner.

Mayne, for the counter-petitioner.

JUDGMENT :—The defendant appeals from an order passed by the Civil Judge of Chicacole rejecting his petition to set aside the judgment in Suit No. 81 of 1863 in which defendant had been placed ex parte.

Defendant had appeared in the suit by pleader on the 5th March 1864. The case was then adjourned to the 20th to enable defendant's pleader to put in a defence. On the 22nd as the pleader was not prepared with any defence the case was set down for trial ex parte, and was so tried.

(a) Present: Frere and Innes, J. J.

1865. January 10. C. P. No. 209 of 1864.

Defendant, having appeared by pleader, had a clear right to cross-examine the witnesses for plaintiff. This, by the order of the Civil Judge placing him ex parte, he was debarred from doing.

The judgment of the Civil Judge is therefore set aside, and he is directed to replace the suit on his file, and proceed with it de novo.

We resolve to point out to the Civil Judge that the matters in issue might have been ascertained by examination of the defendant under Section 125 of the Code of Civil Procedure, and that when a defendant appears either in person or by pleader, the mere circumstance that no written statement is put in on behalf of defendant does not authorize the trial of the suit ex parte.

It is accordingly ordered that the order of the Civil Judge, dated the 19th July 1864, be, and the same hereby is, reversed, and that the cause be replaced on the file of the Civil Court and proceeded with de novo.

Order reversed.

Appellate Jurisdiction.[(a)]

Special Appeal No. 462 of 1864.

KUNHI KOMAPEN KURUPU..........................*Appellant.*
CHANGARACHAN KANDIL CHEMBATA AMBU.....*Respondent.*

Section 15 of Act XIV of 1859 does not abridge any rights possessed by a plaintiff, but is intended to give him the right, if dispossessed otherwise than by course of law, to have his possession restored, without reference to the title on which he holds.

Where a plaintiff sued to recover a paramba, of which he alleged that he was owner, and that the defendant had forcibly dispossessed him. *Held* that the suit was not barred by Section 15 of Act XIV of 1859.

1865. *January* 16. *S. A. No.* 462 *of* 1864.

THIS was a special appeal from an order of A. W. Sullivan, the Civil Judge of Tellicherry on Miscellaneous Petition No. 411 of 1864, confirming the decree of the Principal Sadr Amín's Court of Tellicherry in Original Suit No. 30 of 1863.

The Advocate General, for the special appellant, the plaintiff.

The Court delivered the following

JUDGMENT :—In this case plaintiff sued to recover a paramba, of which he alleged that he was owner and that the defendant had forcibly dispossessed him.

The defendant pleaded that the suit was barred as not having been brought within the period prescribed in Section 15[(b)] of the Limitation Act.

The Principal Sadr Amín held that this section applied to the case, and dismissed the suit because not brought within six months of the alleged dispossession.

The Civil Judge upheld that decision.

(*a*) Present : Holloway and Innes, J.J.

(*b*) Section 15 is as follows :—If any person shall without his consent have been dispossessed of any immoveable property otherwise than by due course of law, such person or any person claiming through him shall, in a suit brought to recover possession of such property, be entitled to recover possession thereof notwithstanding any other title that may be set up in such suit, provided that the suit be commenced within six months from the time of such dispossession. But nothing in this section shall bar the person from whom such possession shall have been so recovered or any other person instituting a suit to establish his title to such property and to recover possession thereof within the period limited by this Act.

1865. January 16. S. A. No. 462 of 1864.

The Lower Courts have wholly misapprehended the object and meaning of Section 15. It was intended, not to abridge any rights possessed by a plaintiff, but to give him the right, if dispossessed, otherwise than by course of law, to have his possession restored, without reference to the title on which he holds, and that which the dispossessor asserts. In cases under that section a lessor, who had dispossessed otherwise than by due course of law a lessee whose term had expired, would be compelled to restore possession to the lessee. The plain object is to discourage proceedings calculated to lead to serious breaches of the peace, and to provide against the person who has taken the law into his own hands deriving any benefit from the process. It was intended to obviate the effect of the possible application of English law to such cases. That law, as laid down in *Harvey* v. *Bridges*[a] is that the freeholder, if entitled to eject the person in possession, may commit an indictable offence in doing so, and yet gain all the advantages of a legal possession and be perfectly secure against the action of the party assaulted.

A more rational view was taken by the majority of the Judges in *Newton* v. *Harland*,[b] a case tried three times. There can be no doubt, however, that in overruling that rational doctrine, the Court of Exchequer was perfectly in accordance with the doctrines of English law. Their decision has been incidentally upheld in the recent case of *Blades* v. *Higgs*[c]. This section is an application of the principle of the " interdictum unde vi," (Mack. Sys. 232, 234, and note *b*,) and by it a possession, lost otherwise than by due course of law, is to be restored, if the applicant makes his demand within six months. It does not, however, prevent him from suing upon his title within the period prescribed by the Statute of Limitations. The Lower Courts have doubtless been led to their present conclusions by the words in Clause 12 " to which no other provision of this Act applies ;" and, considering that Section 15 does apply, have held the period of limitation there laid down the only one applicable. It is clear, however, that Section I of the Act and all its subordinate Clauses, and Sections 2 to 10 apply

(*a*) 14 Mees. and Well., 442.
(*b*) 1 Man. and Gr., 644.
(*c*) 10 C. B. N. S., 713.

to suits in the ordinary acceptation of the term, to cases in which the plaintiff and defendant may place in issue all their legal relations to the subject-matter of litigation, and not to the proceeding in Section 15, by which the defendant is absolutely prevented from showing that his act was not illegal, because, at the period of dispossession, he and not the plaintiff had a present right of possession. Section 15 therefore, in no way, controls Clause 12, inasmuch as it does not prescribe a period of limitation for suits, but, without forcing the person dispossessed to a suit, really provides a remedy other than a suit, and secures to him the position of defendant in a suit, to be brought at the option of his adversary, who, for aught that appears, may be the person entitled. It only limits the period within which the extraordinary remedy must be applied for.

1865. January 16. S. A. No. 462 of 1864.

The judgments of the Lower Courts are reversed, and the suit is remanded with injunction to the Original Court to dispose of it upon the questions of law and fact raised upon the record. The costs of this appeal will be costs in the cause.

Suit remanded.

Appellate Jurisdiction.(a)

Special Appeal No. 459 *of* 1864.

VAYALIL PUDIA MADATHEMMIL MOIDIN KUTTI
AYISSA and another.............................. } *Appellants.*

UDAYA VARMA VALIA RAJAH..........................*Respondent.*

When the demisor of land under a Kanam agreement is unable to give possession, the demisee may repudiate the contract and recover the amount advanced.

THIS was a special Appeal from the decision of A. W. Sullivan, the Civil Judge of Tellicherry, in Regular Appeal No. 83 of 1863, reversing the Decree of the Principal Sadr Amín's Court of Tellicherry, in Original Suit No. 5 of 1862.

1865. January 28. S. A. No. 459 of 1864.

Mayne, for the special appellants, the plaintiffs.

(a) Present: Frere and Holloway, J.J.

1865. January 28. S. A. No. 459 of 1864.

Karnakara Menavan, for the special respondent, the defendant.

The Court delivered the following

JUDGMENT :—In this case the plaintiff sued to recover the sum of Rupees 3,976 with interest. The money is alleged to have been advanced to the predecessor of the present defendant, who is stated to have executed a Kanam document, and another document stipulating to pay interest upon the money advanced in case possession was not given.

The defendant declared the property to be trust property, not pledgable by the deceased; he also declared the document a concoction.

The Principal Sadr Amín decreed the amount sued for, and the Civil Judge, without going into the merits of the case, reversed his decree, because the only right of the plaintiff was to sue for possession of the property, the custom of the country being that the transaction should endure for 12 years.

The contract of Kanam is substantially an agreement by one party, on consideration of the receipt of a sum of money from the other, to place real property in possession of that other for a period of 12 years. As the land cannot be reclaimed before the lapse of 12 years, it seems only consistent with justice that the money should not be reclaimable until that period has elapsed. Where, however, the demisor is unable to give possession, it is reasonable that the demisee should be allowed to repudiate the contract and sue for his money. It is unnecessary however to consider the nature of the possession which will fulfil the demisor's obligation, because in this case a portion of the defence is that the property was not that of the defendant's predecessor, and that he could not demise. This being so, it is obvious that the remedy by suit against the holders of the land must of necessity be altogether illusory. We must not be supposed to be expressing an opinion that the demisee would in any case be bound to bring such suits. It is sufficient in this case to say that if an implied promise not to reclaim the money before the lapse of 12 years is inherent in the passing and acceptance of a Kanam, on defendant's own showing there was in this case an entire failure of the only consider-

1865. January 28. S. A. No. 459 of 1864.

ation which could render the implied promise a binding contract. This being so, there can be no reason for plaintiff not being permitted to recover it. We reverse the decree of the Civil Judge upon this preliminary point, and direct him to decide the suit upon the issues raised. These are— whether the document was in truth executed, and whether if so any money was really advanced upon it, and the proper decree will be for any money proved to have been so lent. The costs of this appeal will be costs in the cause.

Suit remanded.

Appellate Jurisdiction (a)

Civil Petition No. 7 *of* 1865.

Exparte PA'VA'DAY CHETTI..............*Petitioner.*

The Judge of a Court of Small Causes is only empowered by Sec. 21 of Act 23 of 1861 to inflict fine or imprisonment in cases where offences under Section 175 of the Indian Penal Code occur in the presence or view of the Court. The power of the Judge does not extend to cases in which the witness fails to attend, or the failure to comply with an order of the Court is merely inferred from other circumstances.

THIS was a petition against an order of F. C. Carr, the Acting Judge of the Court of Small Causes at Cuddalore, dated 1st November 1864.

1865. *February* 2. *C. P. No.* 7 *of* 1865.

Sloan, for the Petitioner.

JUDGMENT:—Petitioner appeals from an order passed by the Acting Judge of the Court of Small Causes at Cuddalore, fining him 50 Rupees under the provisions of Section 21, Act XXIII of 1861 (*b*).

(*a*) Present : Frere and Innes, J.J.

(*b*) When any such offence as is described in Sections 175, 178, 179, 180 or 228 of the Indian Penal Code is committed in the view or presence of any Court, it shall be competent to such Court to cause the offender, whether he be a European British subject, or not, to be detained in custody; and at any time before the rising of the Court on the same day to take cognizance of the offence; and to adjudge the offender to punishment by fine not exceeding 200 Rupees, or by imprisonment in the Civil Jail for a period not exceeding one month, unless such fine be sooner paid. In every such case the Court shall record the facts constituting the contempt, with any statement the offender may make, as well as the finding and sentence. If the Court, in any case, shall consider that a person accused of any offence above referred to should be imprisoned, or that a fine exceeding 200 Rupees should be imposed upon him, such Court, after recording the facts constituting the contempt, and the statement of the accused person as before provided, shall forward the case to a Magistrate or, if the accused person be a European British subject, to a Justice of the Peace, and shall cause bail to be taken for the appearance of such accused person before such Magistrate or Justice of the Peace, or if sufficient bail be not tendered shall cause the accused person to be forwarded under custody to such Magistrate or Justice of the Peace. If the case be forwarded to a Magistrate, such Magistrate shall proceed to try the accused person in the manner provided by this Act for trial before a Magistrate, and it shall be competent to such Magistrate to adjudge such offender to punishment, as provided in the Section of the Indian Penal Code under which he is charged. If the case be forwarded to a Justice of the Peace, such Justice of the Peace shall enquire into the circumstances and shall have the same powers of punishing the offender as are vested by the Statute 53, George III, Ch. 155, s. 105, in a Justice of the Peace for the punishment of an assault, and may deal with the offender in the same maernn as is provided in that behalf in the said Statute. If such Justice of the Peace shall consider the offence to require a more severe punishment than a Justice of the Peace is competent to award under the said Statute, he may commit the offender to a Supreme Court of Judicature.

1865. February 2. C. P. No. 7 of 1865.

That section incorporates with the Code of Civil Procedure the provisions of Section 163 of the Code of Criminal Procedure, authorizing the summary cognizance of offences committed in view or in presence of the Court coming within Sections 175, 178, 179, 180 and 228 of the Indian Penal Code.

The grounds upon which petitioner was fined appear from the Acting Judge's order to be that he showed disrespect to the process of the Court in the way in which he carried out an order to bring certain documents which the Judge considered tantamount to failure to produce them, and that he absented himself at Pondicherry when he was legally bound to attend the Court.

The absence at Pondicherry would be an offence under Section 174 of the Indian Penal Code, and is not summarily cognizable under Section 21, Act XXIII of 1861. For such an offence it would be necessary, under Section 168 of the Code of Criminal Procedure, to charge the offender before a Magistrate; and it is clear, therefore, that the fine, as far as regarded this offence, could not be summarily imposed.

As regards the other ground, that of failure to produce a document, Section 21, Act XXIII of 1861 contemplates the summary cognizance of such instances only of offences under Section 175 of the Indian Penal Code as occur in the presence or view of the Court, and is not applicable to cases where the witness himself fails to attend, or cases in which the failure is, as in the present instance, merely inferred from other circumstances.

We therefore reverse the order appealed from, and direct the return of the fine.

It is accordingly ordered that the order of the Small Cause Court, dated 1st November, 1864, be, and the same hereby is, reversed, and that the fine collected be returned to the Petitioner.

Order reversed.

Appellate Jurisdiction (a)

Referred Case No. 1 *of* 1865.

LAKSHMI NA'RA'YANA AIYAR *against* SUPPARA GAUNDAN.

The decision of the Court of First Instance as to the admissibility of a document subject to the payment of Stamp duty is final, and cannot be reviewed by the Appellate Court.

THIS was a case referred for the opinion of the High Court by Kristnaswámy, Additional Principal Sadr Amín of Coimbatore, in Suit No. 226 of 1863. 1865. *February* 6. *R. C. No.* 1 *of* 1865.

Mayne, for the plaintiff.

The Court delivered the following

JUDGMENT :—This suit was brought on a writing originally unstamped, but the plaintiff, when presenting his plaint, tendered the amount of the proper stamp together with the prescribed penalty. The District Munsif thereupon admitted the document without inquiry and passed judgment upon it for the plaintiff. On appeal the Principal Sadr Amín submits for our consideration a question as to his competency to review the order of the Munsif admitting the document in evidence.

2. We are of opinion in this case that it was not competent to the Principal Sadr Amín to question the decision of the Munsif as to the admissibility in evidence of the documents sued on, under the provisions of the Stamp Act (X of 1862). The Munsif was empowered by Section 17, Clause 1, of the Act to receive the document in evidence on payment into Court of the proper amount of stamp duty together with the penalty required by Section 15, and the words in Section 17, "whose decision on the point shall be final" have not, we think, the limited sense given to them by the Principal Sadr Amín, but must be read as applicable to the decision come to upon the question of the admissibility of the document in evidence subject to the payment of the required amount. The decision of the Collector of Stamp Duty or Board of Revenue as to the proper Stamp to be im-

(a) Present: Scotland, C. J. and Frere, J.

1865. February 6. R. C. No. 1 of 1865. pressed on a document would, under Section 16, render such document admissible in evidence in any Court of Justice without further question, and Clause 1 of Section 17 gives the same absolute effect to the decision of the Civil Court before which a document not bearing the proper stamp is offered in evidence.

Appellate Jurisdiction (a)

Special Appeal No. 241 of 1864.

CHINNA AIYAN..................................*Appellant.*

MAHOMED FAKR-U-DIN SAIB....................*Respondent.*

The authority of a Collector to modify, confirm, or reverse, the decisions of the Head Assistant Collector under Sec. 3 of Regulation VIII of 1828 is not confined to cases decided under Regulation IX of 1822 only, and the decision of the Collector under Regulation VIII of 1828 is final.

A rule of construction is that the enacting words of a Statute may be carried beyond the preamble, if words be found in the former strong enough for the purpose.

1865. February 9. S. A. No. 241 of 1864. THIS was a Special Appeal from the decision of J. W. Cherry, the Civil Judge of Salem, in Appeal Suit No. 165 of 1863, reversing the decision of the Collector of Salem, in Original Suit No. 4 of 1861.

Rangaiya Naidu, for the special appellant, the defendant.

The Court delivered the following

JUDGMENT:—In this case the Civil Judge reversed the decision of the Collector reversing that of the Head Assistant Collector, on the ground that authority given to the Collector by Section 3, Regulation VII of 1828, embraced only cases decided by his Assistant under Regulation IX of 1822.

At the first hearing of the case it became necessary, in consequence of the decision of the High Court in Special Appeal No. 663 of 1861 (b) as to the scope of Regulation V of 1822, to direct an inquiry whether the proprietor in this case was one paying revenue directly to Government. It having been found that he is so, all question as to the

(a) Present: Holloway and Innes, JJ.

(b) 1 H. C. Rep. 75.

original jurisdiction of the Assistant Collector is, so far as it is affected by that decision, removed, and the only question is whether the Civil Judge was justified in reversing the Collector's decision, because a decision without jurisdiction. 1865. February 9. S. A. No. 241 of 1864.

The ground of the Civil Judge's decision appears to have been the preamble to the Regulation which, even if it could restrain the operation of unambiguous words in the purview of a Statute, could not have that operation here, for the preamble declares that the Regulation is enacted because it is expedient that Assistant Collectors should have, within the divisions confided to them, the power of exercising the functions of Collectors, but always subject to the revising power of the Collector; and then the second branch of the preamble refers to the power of delegation of the jurisdiction under Regulation IX of 1822.

When, therefore, in Section III, the Legislature went on to enact that Collectors should have a power of delegation, but should have the fullest power to confirm, modify, or annul any decision passed by virtue of such delegation, the very general and all-embracing words are in strict accordance with the terms of the preamble. That they gave to the Collector the powers which he exercised in the present case there can be no doubt; they have also the effect of rendering the decision, as finally confirmed, modified, or annulled by the Collector, the decision of the case. As the subject is, however, of very general importance, we may observe that, if the preamble had merely stated the expediency of giving powers of delegation of jurisdiction under Regulation IX of 1822, it is quite clear that, when the enacting words declared that the power of delegation should embrace all authority vested in Collectors by any past or any prospective regulation, which did not expressly forbid such delegation, these words could by no means be controlled by the narrower language of the preamble. In *Fellows* v. *Clay(a)* and *Salkeld* v. *Johnston(b)*, two cases which on the main question exhibited eight Common Law Judges and the Chancellor in conflict with four Common Law Judges and the Vice Chancellor Wigram, there is really no material difference of opinion as to the application of a preamble.

(a) 5 Q. B. 313. (b) 1 Hare 196, and 1 Mac. and G. 242.

1865. February 9. S. A. No. 241 of 1864.

Mr. Justice Coleridge, whose main argument was derived from the restricted preamble, says:—"But although I think the preamble thus clear and pointed, and therefore attach much weight to the inference to be drawn from it, yet I admit that if the enacting words can be shown to go beyond it and to embrace any other case within the mischief sought to be remedied, effect must be given to them:" and Mr. Justice Williams, on the other side of the main question, says:—"That the preamble may well be resorted to for assistance in the exposition of doubtful words in the enacting clause must of course be conceded. But that the enacting clause may be carried beyond the preamble if words be found in the former strong enough for the purpose, I shall assume to be equally undisputed." And the Chief Baron, in the elaborate judgment of the whole Court of Exchequer in *Salkeld* v. *Johnston*, (a) says:—"But the preamble is undoubtedly a part of the Act and may be used to explain it, and is, as Lord Coke says, a 'key to open the meaning of the makers of the Act and the mischiefs it was intended to remedy,' but on the other hand although it may explain, it cannot control, the enacting part, which may and often does go beyond the preamble." It is not to be denied that very loose language has often been used as to controlling the enacting clauses by the preamble, but the exact effect to be given to is stated in the passage above quoted from Williams J., which appears to us to be consistent with reason as well as in accordance with the English authorities.

If therefore this preamble had contained what the judge supposed it to contain, his judgment would have been clearly wrong. It is reversed, and the suit remanded for decision. The decree will provide for the costs of this Special Appeal, which will be paid by the party unsuccessful upon the Regular Appeal below.

Judgment reversed.

(a) Supra.

Appellate Jurisdiction (a)

Regular Appeal No. 74 *of* 1864.

TIMMI REDDY..................................*Appellant.*
ACHAMMA......................................*Respondent.*

Where a widow sued to recover from the brothers of her deceased husband a share of property which remained undivided at his death, a division of part of the family property having taken place during the lifetime of the husband. *Held*, that the plaintiff had no right to recover the property which was actually undivided at the death of her husband.

The doctrine propounded in Sec. 291 of *Strange's Manual of Hindu Law* dissented from.

1865. *February* 11. *R. A. No.* 74 *of* 1864.

THIS was a Regular Appeal from the decree of J. Ratliff, the Civil Judge of Bellary, in Original Suit No. 35 of 1863.

Srínivásáchåry, for the appellant, the first defendant.

Rangácháry, for the respondent, the plaintiff.

The Court delivered the following

JUDGMENT :—This was a suit by a widow of a deceased member of the family to recover from the brothers of her deceased husband a share of property which remained undivided at his death.

The Civil Judge, upon a not very intelligible principle, decreed Rupees 300 to the widow.

In appeal it has been contended that the widow has no claim whatever to the property, which was actually undivided at the death of deceased. On the other side, Section 291 of Mr. Strange's *Manual* was quoted to show that the widow was entitled.

In this case the evidence adduced as to the agreement to divide the property which remained in common after the first division is of the most unsatisfactory character. The plaint recites an agreement to divide after the husband's death, and the oral evidence asserts an agreement to divide when the deceased, who was sick, got better. Moreover, it is impossible to believe that, if there was such an

(a) Present : Holloway and Innes, JJ.

1865. February 11. R. A. No. 74 of 1864.

agreement binding or professing to bind the property at present in dispute, it should not have been carried into effect upon this property at the period of the further division which plaintiff alleges to have taken place after her husband's death.

It is scarcely necessary, therefore, to consider the value attachable to the pundit's opinion embodied in the section of Mr. Strange's book. It is impossible, however, not to notice that the doctrine embodied in this section is quite irreconcileable with that preceding it, which contains a positive decision of the late Sadr Court. There the intention to insist upon division had been pronounced in the life-time of the joint tenant, and he had absolutely obtained a decree for division, yet because that decree had not been executed, he was held to have died undivided. Partial division, such as the pundits state, can at the utmost be merely evidence of an intention to divide the property which remains, and it seems altogether inconsistent with principle to give to such vaguely shadowed intention an effect greater than that assigned to an intention evidenced by a positive suit, followed by a decree adjudging division. The decision of the judicial committee in the *Shivagánga case*(b) has settled that there may be property of the member of an undivided family which is subject to all the incidents of parted property. This is the converse of that case. There seems nothing in principle to prevent the members of a family from being considered divided as to a portion of their property while the status of non-division with all the incidents of joint tenancy attaches to the portion which, for any reason of convenience or otherwise, they have chosen to leave undivided.

We are expressing no opinion as to the effect of a contract made with the husband in his life-time, for there is no evidence here of such a contract. Still less are we expressing our assent to the doctrine that nothing short of an absolute partition by metes and bounds in the life-time of the deceased member will make his share the property of a divided member. It is sufficient to say that the property, of which the widow here seeks a share, was at the death

(b) 9 Moore's I. A. 539.

of her husband held in joint tenancy, and this being so, the right of survivorship naturally by Hindu law attaches to it. The decree of the Lower Court will be reversed, but, as the point was not put before the Lower Court, it will be reversed without costs. 1865. February 11. R. A. No. 74 of 1864.

Decree reversed.

Appellate Jurisdiction (a)

Special Appeal No. 451 *of* 1864.

CHERUKURI VENKANNA..................................*Appellant.*

MANTRAVATHI LAKSHMI NA'RA'YANA SA'STRULU .... *Respondent.*

Civil Courts have jurisdiction to enquire into the title of lands enfranchised by the Inam Commissioner, and the sannad granted by the Commissioner may be annulled without destroying its effect as an enfranchisement of the Inam.

In a suit by the adopted son of the late possessor of an Inam to recover it: *Held*, that the plaintiff might recover notwithstanding the production by the defendant of title deeds shewing that the land had been granted to the defendant by the Inam Commissioner.

THIS was a special appeal from the decision of J. R. Kindersley, the Acting Civil Judge of Rajahmundry, in Appeal Suit, No. 191 of 1863, modifying the decree of the Principal Sadr Amín's Court of Rajahmundry in Original Suit No. 5 of 1863. 1865. February 11. S. A. No. 451 of 1864.

Sloan, for the special appellant, the plaintiff.

The Court delivered the following

JUDGMENT :—This was a suit by the adopted son of the late possessor of an Inam to recover it with some other property which is not within the matter of the present appeal.

The defendant alleged that the property had been made over to him by his deceased father-in-law in his lifetime.

The Principal Sadr Amín decreed for the plaintiff, and in appeal the Civil Judge upheld his decision with respect to all but the Inam land. The disallowance of this part of the claim was made by the Civil Judge in the following words :—

"As for the Inam lands in dispute, title deeds filed by the defendant show that they have been granted by the Commissioner of Inams to the defendant. The Court has

(a) Present: Holloway and Innes, JJ.

1865. February 11. S. A. No. 451 of 1864.

no power to annul that grant by adjudging the lands to the plaintiff. The Court cannot annul the title deeds by which jurisdiction is given to the Court; for, if the title deeds be invalid, the Inam is not enfranchised, and the Court has no jurisdiction."

The reasoning of the Judge is, that, save for the sannad of the Inam Commissioner the suit could not be brought, and that the sannad must be taken altogether; that it is impossible to annul it so far as it grants the Inam to the defendant without destroying its effect as an enfranchisement of the Inam.

It appears to us that this reasoning is manifestly fallacious. It was within the scope of the Commissioner's authority to commute this peculiar property into property subject to all the ordinary incidents of landed property. The Madras Act IV of 1862 defines the effect of the Commissioner's certificate. It is to be sufficient evidence of the enfranchisement of lands previously Inam, and the effect of that enfranchisement is to remove from the claimant the disabilities to sue in the ordinary Courts of Judicature, which Regulation IV of 1831 and the Acts explaining it had imposed. No authority, however, was given to the Commissioner to determine the rights of claimants. The effect of his act, as explained by Madras Act IV of 1863, was to divest the Governor in Council of the jurisdiction to determine such claims and to vest the power of determining in the ordinary Courts.

This being so, it is manifest that the adopted son is entitled to succeed to the real estate of his father. Our decree in modification of that of the Court below will be to reverse so much of the decree of the Civil Judge as modified that of the Principal Sadr Amín. We think that the defendant, whose appeal led to the modification, must pay the costs both of the appeal to the Civil Judge and that to this Court, in which he has not appeared.

Appeal allowed.

Appellate Jurisdiction (a)

Referred Case No. 23 of 1864.

GURIVI CHETTY *against* P. AIYAPPA NAIDU.

Plaintiff sued upon a document promising to pay the price of grain supplied at defendant's request :—*Held* that, being a contract in writing which could not have been registered by any law in force at the period of making, the time of limitation was that prescribed by Sec. 16 of Act XIV of 1859.

THIS was a case referred for the opinion of the High Court by C. J. Longley, the Acting Judge of the Court of Small Causes at Chittoor.

1865. *February* 20. *R. C. No.* 23 *of* 1864.

No counsel were instructed.

The Court delivered the following

JUDGMENT :—In this case the suit was brought upon a document promising to pay Rupees 70, the price of grain supplied at the defendant's request.

The defendant pleaded that the suit was barred by the Act of Limitations, (Act XIV of 1859) and the Judge of the Court of Small Causes held the demand barred by Clause 10, Sec. 1 (b) of the Act, and submitted, for the judgment of this Court, whether his ruling was correct.

The transaction here in question was manifestly a contract to re-pay the money value of grain advanced. It is a contract in writing and one which could not have been registered by any law in force at the period of making it. This being so, Clause 10 does not apply to it, and, there being no other provision of the Act specially applicable, the period of limitation is that prescribed in Clause 16, six years. We are of opinion, therefore, that the decision of the Acting Judge of the Court of Small Causes is wrong.

(a) Present : Scotland, C. J. and Holloway, J.

(b) Clause 10 is as follows :—

"To suits brought to recover money lent or interest, or for the breach of any contract in cases in which there is a written engagement or contract and in which such engagement or contract could have been registered by virtue of any Law or Regulation in force at the time and place of the execution thereof—the period of three years from the time when the debt became due or when the breach of contract in respect of which the action is brought first took place, unless such engagement or contract shall have been registered within six months from the date thereof."

Appellate Jurisdiction (a)

Special Appeal No. 161 of 1864.

KRISHNA AIYAN and another..................*Appellants.*

ANANTARA'MA AIYAN and others............*Respondents.*

Plaintiff sued to establish his exclusive right to receive fees paid to the Purohits by the pilgrims resorting to a temple and to recover a sum of money received by the defendants as fees. *Held* that, in the absence of any contract between the parties, or of any such proof of long and uninterrupted usage as in the absence of a documentary title would suffice to establish a prescriptive right, the plaintiff's suit must be dismissed.

1865. February 23. S. A. No. 161 of 1864.

THIS was a special appeal from the decision of M. Sadásiva Pillay, the Principal Sadr Amín of Madura, in Regular Appeal No. 18 of 1864, reversing the Decree of the District Munsif of Permagudy in Original Suit No. 18 of 1863.

Rangachâry, for the special appellants, the third and fifth defendants.

Rájágópálachâry, for the special respondent, the third plaintiff.

The Court delivered the following

JUDGMENT:—This suit was instituted with the view of establishing the exclusive right of the plaintiffs to receive fees paid to the Purohits by the pilgrims resorting to a temple in the Madura District, and to recover the sum of rupees fifty being the amount of fees received by the defendants.

The District Munsif, Mr. T. Misquita, dismissed the plaintiff's claim, on the ground that the fees in question constituted a voluntary offering from the pilgrims to the shrine, and that to compel the collection of these fees in favor of particular parties would therefore be contrary to the policy of the law. In appeal, however, the Principal Sadr Amín, Sadásiva Pillay, reversed this decision, and gave judgment in favour of the plaintiffs.

(a) Present: Frere and Innes, J. J.

We are of opinion that the District Munsif has taken a correct view of the law in reference to this case. In the absence of any contract between the parties, or, to adopt the language of the Privy Council in their judgment on the appeal, *Rámasámy Aiyan and others* v. *Venkatachárry and others*,(b) under date 27th April 1862, of "any such proof of long and uninterrupted usage as in the absence of a documentary title will suffice to establish a prescriptive right," the case is precisely similar to those stated in the decrees of the late Sadr Court on Appeals Nos. 64 and 71 of 1844, published at pages 77 and 83 of the 2nd Volume of *Select Decrees*, according to which a claim to exercise any such particular profession to the exclusion of others in unsustainable. We resolve, therefore, to reverse the decree of the late Principal Sadr Amín, and to dismiss the claim of the plaintiffs, with all costs. 1865. *February* 23. S. A. No. 461 of 1864.

Appeal allowed.

(b) 9 Moore's In. Ap. 344.

Original Jurisdiction (a)

Criminal Case Reserved.

THE QUEEN *against* KUMARASA'MI.

Upon an indictment under Section 498 of the Indian Penal Code charging that the prisoner took away one A. who was then and whom he then knew to be the wife of one M. with the intent that he might have illicit intercourse with the said A. *Held* that, there was a taking within the meaning of the Section although the advances and solicitation had proceeded from the woman and the prisoner had for some time refused to yield to her request.

CASE stated by Bittleston, J.

"The prisoner Kumarasámi was tried before me at the last Criminal Sessions upon an indictment which charged under Sec. 498(b) of the Penal Code that he took away 1865. *February* 24.

(a) Present: Scotland, C. J. and Bittleston, J.

(b) The Section is as follows :—

"Whoever takes or entices away any woman who is, and whom he knows or has reason to believe to be the wife of any other man from that man, or from any person having the care of her on behalf of that man, with intent that she may have illicit intercourse with any person, or conceals, or detains with that intent any such woman, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

1865. February 24.

one Agilandam who was then and whom he then knew to be the wife of one Muttusami Mudali from the said Muttusami Mudali with the intent that he might have illicit intercourse with the said Agilandam.

It appeared in evidence that the prisoner and one Rámaswámy, who were neighbours of the prosecutor, met his wife Agilandam in the street on the 17th November last, she having left her husband's house to fetch water, that the three went together by Railway to Vellore and Arcot where the prisoner and Agilandam remained about 12 days and where sexual intercourse took place between them, but Rámaswámy swore and the Jury found as a fact that Agilandam asked the prisoner to allow her to go with him, that all the solicitations proceeded from her and that the prisoner for some time refused to yield to her request.

I told the Jury that this did not in my opinion exonerate the prisoner from the charge, that the 498th Section of the Code was framed for the protection of the husband and that though the request and solicitations came wholly from the wife, yet as the prisoner had yielded to it and gone away with her, there was a sufficient taking on his part within the meaning of the Section. The Jury found the prisoner guilty, and I sentenced him to six weeks' simple imprisonment, but feeling some doubt whether my direction was right I have reserved the question for the decision of the High Court."

No counsel appeared.

The Judgment of the Court was given by Sir C. H. SCOTLAND.—I do not think that the facts found of the woman having been the tempter and the prisoner in the first instance reluctant to yield to her solicitations can render the case different from one in which the advances and solicitations are on the part of the man and the woman complies and willingly leaves her husband and co-habits with the man. All that can be said is that her consent is given under circumstances of greater profligacy in the one case than in the other. In this case, therefore, it seems to me the real point for consideration is simply whether the wife's willingness and consent, evidenced by her solicitations of the pri-

soner and the circumstances under which she left her husband and remained absent from him, afford any defence to the prisoner. 1865. February 24.

Now the section and the preceding section (497) (a) were evidently intended for the protection of husbands who alone can institute prosecutions for offences under them. It is the taking or enticing of the wife from the husband or the person having the care of her on behalf of the husband for the illicit purpose that constitutes the offence. If whilst the wife is living with her husband a man knowingly goes away with her in such a way as to deprive the husband of his control over her with the intent stated in the section, that, I think, is a taking from the husband within the meaning of the section. The wife's complicity in the transaction is no more material on a charge under this section than it is on a charge of adultery. For these reasons, I think the conviction must be affirmed.

Conviction affirmed.

(a) Section 497 is as follows:—

"Whoever has sexual intercourse with a person who is, and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor."

Appellate Jurisdiction (a)

Special Appeal No. 1 *of* 1865.

PADAGALINGAM PILLAY.....................*Appellant.*

SHANMUGHAM PILLAY and others.........*Respondents.*

A suit ought not to be entertained where the plaintiff, who merely seeks for a declaration of title, is in possession of all his alleged rights and is not in position to bring an action.

THIS was a Special Appeal from the decision of A. P. Srinivasa, the Officiating Principal Sadr Amín of Tinnevelly, in Regular Appeal Nos. 78 and 79 of 1864, confirming the decree of the Court of the District Munsif of Strívaikuntam in Original Suit No. 277 of 1863. 1865. February 25. S. A. No. 1 of 1865.

(a) Present: Frere and Innes, JJ.

1865. February 25. S. A. No. 1 of 1865.

Srínivásácháry, for the special appellant, the plaintiff. The Court delivered the following

JUDGMENT:—Plaintiff in this suit sought for a decree establishing, as against fifth, sixth and seventh defendants, his proprietary title to certain mányam lands in his possession. The fifth, sixth and seventh defendants, he said, were entitled only to the melváram, but had assumed to be proprietors of the land itself by taking from defendants one to four agreements to pay rent.

The Court of First Instance and the Lower Appellate Court dismissed plaintiff's claim to a proprietary right in the lands, but decreed that the three agreements for rent should be given up and cancelled.

The plaintiff alone preferred a Special Appeal to the High Court, and we can only deal with the decrees of the Lower Courts in so far as his appeal relates to them; and we find no grounds put forward in special appeal which would warrant us in disturbing the original and appeal decrees in so far as they dismiss plaintiff's claim.

We think, however, that this suit should not have been entertained at all.

Plaintiff sought merely a declaration of title. He was in possession of all his alleged rights, and was not in a position to bring an action.

Section 15 of the Civil Procedure Code does indeed seem to imply that actions may be entertained for a mere declaration of right, and that such declaration of right may be decreed without consequential relief being granted, but this section is almost word for word identical with the fourth section of the Chancery Amendment Act (15 and 16 Vic. c. 86), and the decisions of the Court of Chancery in *Jackson* v. *Turnley*,(a) and in other more recent cases upon that section, seem to indicate that the section contemplates those cases alone in which the Court would be capable of giving relief were it sought for.

In *Jackson* v. *Turnley* the Vice Chancellor said, "I am of opinion that this question cannot be litigated; that the representative of a deceased lessee cannot file a

(a) 1 Drew, 617.

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bill against the lessor to litigate the question whether, in the event of a breach of covenant taking place, the lessor would have a right founded upon it, and I may here observe that the last branch of the section is not unimportant; it says, 'And it shall be lawful for the Court to make binding declarations of right without granting consequential relief.' That seems to imply that it contemplates a case in which the Court is capable of giving consequential relief. Here there is not merely no consequential relief asked but none is capable of being given. I am of opinion that this Act meant only to remove the objection that a mere declaratory order is asked by the bill. It meant this,—When a person may have a right to property, the Court, though not asked to give relief by its decree, may declare that the party has such right. It did not intend to authorize such a declaration at the instance of a plaintiff that some person who claims such a right has no such right."

In the case before us no relief consequential upon the order sought for is capable of being given. Plaintiff has all his rights uninvaded and intact, and there was therefore no foundation for an action. He had no ground for bringing and could not therefore bring before the Court the question of title for adjudication as between him and fifth, sixth, and seventh defendants.

We dismiss the appeal, therefore, on the ground that plaintiff had no original cause of action.

Appeal dismissed.

Appellate Jurisdiction (a)

Referred Case No. 6 of 1865.

RA'YAPPA CHETTI *against* ALI SA'HIB and another.

Plaintiff sought to recover the amount of a bond executed by the father of the defendants, and prayed for a judgment against certain land which belonged to the defendants' father and the right to which passed by succession to the defendants. *Held*, that the plaintiff was entitled to a decree for payment by the defendants of the amount of the bond out of any property which passed to them as the representatives of their father the plaintiff, in execution of the decree, being at liberty to proceed in respect of the immoveable property, if there should be no moveable property left, or if it should prove insufficient when sold to satisfy the decree.

1865. *March* 8. *R. C. No.* 6 *of* 1865.

THIS was a case referred for the opinion of the High Court by T. V. Ponnaswámi Pillai, the District Munsif of Cheyur, in Suit No. 8 of 1865.

No counsel were instructed.

The Court delivered the following

JUDGMENT:—In this suit the plaintiff sought to recover from the defendants the amount due on a bond executed by their late father. The defendants admitted that there was a piece of land which belonged to their father, but denied that it or any other part of his estate was in their possession. The plaintiff prayed for a judgment against this land, but the Munsif dismissed the suit, subject to the opinion of the High Court on the ground that plaintiff had failed to show that the defendants were in possession of any property from their father.

The questions submitted for decision are:—

I. Whether the District Munsif is competent to make immoveable property liable for simple debts, when the debtor is proved to have died possessed of no moveable property?

II. Whether the immoveable property belonging to a debtor who died previous to the institution of a suit for the recovery of the debt, and which is not proved to be in the possession of any particular person, can be declared to be liable for such debt?

(a) Present: Scotland, C. J. and Innes, J.

We understand from the case as stated that the right to the piece of ground referred to in the case passed by succession to the defendants from their father and that they are entitled to possess themselves of it. This being so, the plaintiff, upon proof of the bond and the debt due, was entitled to a decree for payment of the same by the defendants as the representatives of their father out of any property which passed to them from their father. The liability of any particular property should not be specifically declared in the decree, but in execution of the decree the plaintiff will be at liberty to proceed under Section 203 of Act VIII of 1859, first in respect of the moveable property, if any, left by the deceased, and if there should be no such property, or if it should prove insufficient when sold to satisfy the decree then he may proceed against the immoveable property under Section XI of Act XLII of 1860. These observations afford an answer to both the questions submitted. 1865. *March 3.* *R. C. No. 6 of 1865.*

Decision reversed.

Appellate Jurisdiction (a)

Regular Appeal No. 65 *of* 1864.

MUTTAMMA'L.......................................*Appellant*.
KA'MA'KSHY AMMA'L and others....................*Respondents*.

A woman divorced for adultery, who has continued in adultery during her husband's life and in unchastity after his death, is not entitled to maintenance out of the property of her deceased husband according to Hindu Law.

THIS was a regular appeal from the decision of G. A. Harris, the Civil Judge of Coimbatore, in Original Suit No. 14 of 1864. 1865. *March 4.* *R. A. No. 65 of 1864.*

G. E. Branson, for the appellant, the plaintiff.

The Advocate General, for the respondents, the first, second and third defendants.

The Court delivered the following

JUDGMENT:—This is an appeal from a decree of the Civil Judge of Coimbatore disallowing plaintiff's claim to the property of her deceased husband.

(a) Present: Holloway and Innes, JJ.

1865. March 4. R. A. No. 65 of 1864.

The ground of the disallowance was that the plaintiff had been put away for adultery.

The evidence establishes with abundant clearness that this woman, both previously to and subsequently to the marriage with the deceased, was guilty of habitual unchastity. The evidence of her paramour, supported by other evidence, shows this. It is clear, moreover, from the breaking of her táli on leaving her husband's house and resorting to that of her paramour that she was herself conscious that the marriage was dissolved long before the husband's death. It is quite clear that she is not his widow.

The vakil for the appellant then sought to obtain maintenance on the ground that even the wife guilty of adultery is entitled to support. Although not claimed by the plaint, looking at the principles of the Hindu Law as to the right to maintenance of many classes excluded from the inheritance and almost because of that exclusion, we should not have refused to deal with the question. Whatever, however, may be the cases in which an adulterous wife may claim a bare subsistence, it is quite clear that the case of a woman, divorced for adultery, who has continued in adultery during her husband's life and in unchastity after his death, is not one of them. It is unnecessary therefore to discuss, and we do not discuss, the real meaning of the rule. It is quite sufficient to say that this case does not fall within it.

The decree of the Civil Judge is in all respects right, and this appeal is dismissed with costs.

Appeal dismissed.

Appellate Jurisdiction (a)

Referred Case No. 3 of 1865.

VENKATASA'MY NA'IK *against* VATTAMALAY GAUNDAN.

Execution against the person of a judgment debtor is not a preliminary step necessary to entitle the judgment creditor to proceed against the debtor's immoveable property under Sec. XI, Act XLII of 1860.

THIS was a case referred for the opinion of the High Court by T. V. Ponnaswámy Pillay, the District Munsif of Cheyúr, Zillah Coimbatore.

1865. *March* 6. *R. C. No.* 3 *of* 1865.

No counsel were instructed.

The Court delivered the following

JUDGMENT:—The question submitted for our decision is " whether a judgment creditor can proceed against the *immoveable* property of a judgment debtor, declared not to be in possession of any personal property, without first proceeding against his *person ?*"

We are of opinion that execution against the person of a judgment debtor is not a preliminary step necessary to entitle the judgment creditor to proceed against the debtor's immoveable property under Section XI, Act XLII of 1860. The party obtaining the decree may have execution in the first instance either against the person or the personal property of the judgment debtor, but the proceeding under Section XI is made conditional only upon the debtor's moveable property having been realised by a sale in execution. The Court must be satisfied that there is no moveable property of the debtor remaining unsold in satisfaction of the judgment, and, if so, the judgment creditor is entitled to proceed under Section XI. (See *Referred Case* 5 *of* 1863, 1 *High Court Reports*, 191.)

(a) Present: Scotland, C. J. and Innes, J.

Appellate Jurisdiction (a)

Referred Case No. 4 of 1865.

VI'RA PILLAY *against* MURUGA MUTTAYAN.

In computing the period of limitation under Act XIV of 1859, Sec. XI the period of the plaintiff's legal disability by reason of minority cannot be deducted.

1865. *March* 6. *R. C. No.* 4 *of* 1865.

THIS was a case referred for the opinion of the High Court by the District Munsif of Torriore.

No counsel were instructed.

The Court delivered the following

JUDGMENT :—This suit was brought for the recovery of money lent on an unregistered bond, which provided for the payment of the loan on the 10th February 1860. The plaintiff's father died in July 1862, and the plaintiff, who was then a minor, brought this suit at the end of 1864, six months after he attained his majority.

The District Munsif has decided that the plaintiff is not entitled, in computing the period of limitation, to exclude the time which intervened between his father's death and his coming of age, but has reserved the point for our final determination.

The opinion of the District Munsif in this case is right. When the cause of action accrued to the plaintiff's father he was under no legal disability, and by the express terms of Section XI of the Limitation Act, the time of the plaintiff's legal disability by reason of minority cannot be deducted.

With reference to the District Munsif's remark as to the injurious application of the enactment, we would observe that proper legal proceedings to enforce the bond might have been taken during the plaintiff's minority.

(a) Present : Scotland, C. J. and Innes, J.

Appellate Jurisdiction (a)

Special Appeal No. 448 *of* 1864.

A. VISSAPPA.................................*Appellant.*
A. RA'MAJOGI and others.....................*Respondents.*

The certificate of the Inam Commissioner does not afford conclusive evidence of the title of the person to whom it was granted, nor is his decision one over which the Civil Courts have no jurisdiction. His duties were not of a judicial character, but he was authorized to deal with those in possession of inams on certain terms, varying with the nature of the holding, while incidentally he was to determine, but for the prescribed purpose only, the nature of the title by which the person whom he found in possession actually held it.

The case of *Sundaramúrti Mudali* v. *Vallináyaki Ammál* (1. H. C. R. 465) observed upon and distinguished.

The distinction between enactments which declare contracts absolutely void, and those which simply provide that no action shall be brought upon such contracts, pointed out.

1865. *March* 11. *S. A. No.* 448 *of* 1864.

THIS was a special appeal from the decision of J. R. Kindersley, the Acting Civil Judge of Rajahmundry, in Appeal Suit No. 24 of 1862, confirming the decree of the District Munsif's Court of Rajahmundry, in Original Suit No. 410 of 1861.

Srínivásácháry, for the special appellant, the plaintiff.

Sloan, for the first special respondent, the first defendant.

The Court delivered the following

JUDGMENT:—This was a suit to recover a portion of land alleged to have partially fallen to plaintiff by inheritance and partially by a purchase from first defendant in 1844. Ouster through the intervention of the Inam Commission and the wrongful taking possession under their authority seem to have been alleged.

The defendant denied the whole statement.

The Civil Judge, on the same grounds as those dealt with in Special Appeals Nos. 354 and 452 of 1864, disallowed the whole claim, and he deals thus with the claim under the alleged sale:—

(a) Present: Holloway and Innes, JJ.

1865. March 11. S. A. No. 448 of 1864.

"Taking the plaint as it stands, I am of opinion that the plaintiff must be non-suited. He claims certain inam lands which he admits to have been granted by the Inam Commissioner to the defendant. He claims to set aside that grant on account of a sale which took place previously to the grant, when the Court had no jurisdiction. The inam in question has been declared by the Commissioner to have been inalienable, and it has been brought within the jurisdiction of the Courts only by the enfranchisement; and on the deed of enfranchisement alone can any title be founded.

"The inam was previously under the exclusive administration of the Executive Government, and the Government, through their Commissioner, had authority to grant it to whomsoever they chose.

The argument of the Civil Judge divides itself into two propositions:—I. If there was the contract alleged, it took place at a time at which the Court had no jurisdiction, and cannot therefore now be enforced. II. The Inam Commissioner was vested by the Government with the exclusive power of determining that which before the enfranchisement they themselves had the power of determining, the property in the Inam, and the Inam Commissioner as their delegate has decided it in favor of the defendant, and over this decision the Court has no jurisdiction. For the latter of these positions we are unable to discover any authority. The Inam Commissioner's duties by the instructions of the executive were in no way judicial. He was to deal with those in possession of inams on certain terms, varying with the nature of the holding, while incidentally he was to determine, but for the prescribed purpose only, the nature of the title by which the person whom he found in possession actually held it. We can see no warrant in the rules under which he acted for supposing that his duties were of a judicial character, with which the Executive Government had power by clause 2, Section 2, Regulation IV of 1831 to invest him. The rules published certainly seem clearly to confine the Commissioner to the determination of the class of inam lands to which the holding belongs, and the application to such holding of the terms on which the reversionary right of Government was to be surrendered. Madras Act

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IV of 1862 distinctly shows, as it seems to us, that this is the scope of his authority. Section II shows that his certificate is to be evidence that the land has been enfranchised, and Section I shows that the effect is to relieve land so enfranchised from the operation of Regulation IV of 1831 and the Acts which explain it. We are clearly of opinion therefore that the effect of the certificate is not to afford conclusive evidence of the title of the person to whom it was granted.

The first proposition, too, as the Judge has stated it, will not show the Court to have no jurisdiction. His two propositions together however undoubtedly show him to be of opinion that the sale alleged was absolutely void. If the effect of Regulation IV of 1831 was to declare all contracts of this kind absolutely void, there exists no doubt that the decision is perfectly correct. We must admit that but for some observations contained in the judgment in *Sundaramúrti Mudali* v. *Vallináyaki Ammál* (a) we should not have considered the effect of Regulation IV of 1831 a matter of any great difficulty.

On the report of this case, we must suppose the Shrotriam not enfranchised, and that the Government had given the necessary permission to sue. The plaintiff was the heir at law of the deceased holder and the defendant his devisee. The decree was in favor of the plaintiff and the *ratio decidendi* was that the effect of Regulation IV of 1831 and the explaining Acts upon the sannad not produced, which was a grant for three lives, was to render the grant like an estate tail in strict settlement. In fact it was construed as a gift to the life in being, to the heir, and the heir of that heir. They were all to take by purchase. It appears, therefore, that the decision was arrived at on the terms of the gift.

Undoubtedly that case is distinguishable from the present by the circumstance that alienation before enfranchisement would bring the case within the mischief against which Regulation IV of 1831 was intended to provide, the destruction of the reversionary right of Government. Nothing therefore which it is necessary to decide in the pre-

(a) 1 H. C. Rep. 465.

1865. March 11. S. A. No. 448 of 1864.

sent case is touched by the actual decision there, and we are not bound by the language used in delivering the judgment, which appears, moreover, to have been an oral one. All that was necessary to the decision of that case was the determination that the devise set up was contrary to the form of the gift and was within the mischief of the Regulation. We consider therefore that the true construction of the Regulation is a question entirely open, and we proceed to consider it.

The provisions of the enactment render claims for the recovery or continuation of or participation in such grants not cognizable by the Courts unless the plaint is accompanied by an order of the Secretary to Government referring the complaining party to the Courts, and because the right to decide upon such claims is reserved to the Governor in Council. Moreover the words "whether against private individuals or public officers" show that, whether the question at issue is "inam or no inam," or whether the question is, does this inam belong to A or B, the jurisdiction is equally excluded. Then Section III, explained by Act XXIII of 1838, declares inams not attachable or sequesterable in satisfaction of a decree of Court. So far there is certainly nothing in the Regulation, even explained by the subsequent Act, to declare contracts touching these inams void. The whole effect is to prevent the ordinary Courts from deciding the matter and to leave the decision to the Governor in Council in his executive capacity, and there is nothing in this Regulation to prevent the Governor in Council from upholding a sale of the inam or a contract binding it. On its original enactment too the inam was attachable for the satisfaction of the obligations and debts of the holder. The intention then at all events could not have been to protect the holder and attach the inam to him and his heirs, as certain heir looms were settled by Act of Parliament upon the Dukes of Wellington. The rules certainly do no more than forbid a suit in the ordinary Courts. The words really amount to " No action shall be brought in the ordinary Courts unless the parties are referred thither for redress by the Government." The title of the Regulation is of course a matter wholly indifferent, and even if the preamble could extend the enacting words, a very doubtful

point, it seems to us that the preamble still points only at the mischief at which alone the enacting part of the Regulation is directed.

To show that the effect is not absolutely to avoid a contract, but simply to prevent a suit being brought upon it in the ordinary Courts, it is sufficient to compare the language of this Regulation with that of VI of 1831. There Section II declares the inam " inalienable from such offices by mortgage, gift, sale, or otherwise." These words would undoubtedly render such a transaction absolutely void.

The construction of Sections IV and XVII of the Statute of Frauds is an apt example of the distinction between statutes which declare transactions absolutely void and such as simply provide that no action shall be brought upon them. *LeReux* v. *Brown*,(a) the leading case upon this matter, over-ruled the language of the Judges rather than the decision of the Court in *Carrington* v. *Roots*(b). In this case it is quite clear that the plaintiff could not prove the trespass without proving the contract, and the contract, relating to an interest in land, could only be proved by a writing; the plaintiff's case therefore of necessity failed. *Reade* v. *Lamb*(c) and *Battlemere* v. *Hayes*(d) two other cases in the Exchequer, were really only authorities for the position that the plaintiff would, under the general issue, be compelled to prove a contract in writing as required by the Statute of Frauds, and there is nothing unreasonable in saying that the person bringing an action must prove a contract upon which an action can be brought. There is therefore no authority for saying that words declaring a contract void or not good have the same meaning as words declaring that an action shall not be brought. Suppose the Statute of Frauds abolished, and an action after the abolition brought upon a verbal sale of lands, if no other objection existed than the one that at the period of the agreement the 4th Section of the Statute was in force, the vendee would unquestionably recover. Not so, however, if if was a contract subject to the 17th Section which had not complied with its provisions.

(a) 12 C. B. 801. (b) 2 Mee. and Wels. 248.
(c) 6 Exch. 130. (d) 5 Mee. and Wels. 456.

1865. March 11. S. A. No. 448 of 1864.

The present case is stronger because this Regulation did not forbid the bringing of suits but reserved their decision to the Governor in Council or his delegate. The plaintiff claims under a contract invalidated by no Regulation, but made at a time at which he could not sue upon it. Subsequently the object matter of the contract and the contract itself, by Madras Act IV of 1862, became amenable to the jurisdiction of the ordinary Courts. It seems clear to us that there is no want of jurisdiction, because we are of opinion that the Regulation did not render the inam inalienable, and that the function of the Inam Commissioner was simply to determine the terms on which the land should assume the same qualities as all other land, and that, although for the purpose of obeying the rules propounded by his superiors, he necessarily inquired into the character of the holding, yet that inquiry was not made under the judicial powers of Government, but incidentally with a view to the merely administrative measure which he was to carry out. Not only do his instructions show this, but the Legislature, in summing up the result of his work, have shown it with abundant clearness.

On the point on which he has dismissed this Appeal, we consider the Civil Judge in error, reverse his decision, and remand the suit for decision. The costs of this Appeal will be paid by the party finally unsuccessful in the Court below and will be provided for in the decree.

Suit remanded.

Appellate Jurisdiction (a)

Special Appeal No. 2 of 1865.

SUBHAIYAN and another..................... *Appellants.*
SANKARA SUBHAIYAR........................ *Respondent.*

Where a suit was brought for a division of family property 12 years after the death of the head of the family, *Held*, that the suit was not barred by cl. 13, Sec. 1 of Act XIV of 1859.

THIS was a special appeal from the decision of C. R. Pelly, the Acting Civil Judge of Madura, in Appeal Suit No. 334 of 1863, confirming the decree of the Principal Sadr Amín of Madura, in Original Suit No. 122 of 1863. 1865. *March* 11. *S. A. No. 2 of* 1865.

Tirumalachâry, for the special appellants, the first and second defendants.

Rájagopalachâry, for the special respondent, the plaintiff.

The Court delivered the following

JUDGMENT :—In this suit a share of family property was awarded by the Principal Sadr Amín who found the plaintiff and two others undivided. He made the same decree in favour of the defendants in a suit in which the positions were reversed.

It was argued in appeal that Clause 13, Section I of the Limitation Act barred the suit, because the head of the family had been dead for more than 12 years.

Whether this singularly worded clause, without any words for that purpose, is intended to abolish the old rule that the possession of one joint tenant is that of all and the equally salutary maxim "nemo sibi ipse causam possession is mutare potest," it is not now necessary to decide. It is equally unnecessary to say whether its effect, where it has any operation, is in all circumstances to compel a suit for partition within 12 years, or whether it is confined to cases in which exclusive possession of the whole of the father's estate has been held to the exclusion of the others by one of

(a) Present : Frere and Holloway, JJ.

1865. March 11. S. A. No. 2 of 1865.

the brothers or co-parceners in accordance with some texts of the Bengal law in happy conflict with others. We say that it is unnecessary to decide, and we gladly abstain from deciding these points, because it is manifest that the section applies to cases of the plaintiff's right accruing by descent. It is manifestly therefore wholly inapplicable to the case of these provinces, in which the right to property and of consequence to partition does not accrue in the manner described in this section. In the first section of the *Mitacshara* there is a discussion involved in a mist more than usually impenetrable—whether the origin of property is by birth or not, and the result, whatever we may think of the reasoning, is that it arises by birth. The rules of partition and the incompetency of one member to alienate and the whole law of property in the Benares School are posited upon this principle. It is clear, therefore, that whatever the meaning of this clause, it can have no application where the death of any one of the co-parcenery, whether father or others, is an event altogether without legal effect. The right to a share is never a consequence of such death, and property, at all events real property, can in no circumstances be said to have descended to any member of an undivided family, because from his birth he is a joint tenant with the rights of survivorship.

There is, therefore, nothing in the point, and the special appeal is dismissed with costs.

Appeal dismissed.

Appellate Jurisdiction (a)

Special Appeal No. 320 *of* 1864.

PALAVARAPU MUTTANNA and others.........*Appellants.*
CHANDU'RI NARAPPA and others............*Respondents.*

A Court has no power to reverse an order of a co-ordinate Court which has determined the precise question after a suit has proceeded to its conclusion in pursuance of that order.

1865. *March* 11. *S. A. No.* 320 *of* 1864.

THIS was a special appeal from the decree of J. Wilkins, the Judge of the Court of Small Causes of Masulipatam, in his capacity of Principal Sadr Amín, in Regular Appeal No. 21 of 1864, reversing the decree of the Court of the District Munsif of Masulipatam in Revised Suit No 168 of 1861.

Tirumalachary, for the special appellants, the plaintiffs.

Rájagopalachary, for the special respondents, the defendants.

The Court delivered the following

JUDGMENT :—In this suit the late Civil Judge decided the cause of action had not passed in *rem judicatam*, and directed the trial of the suit upon the merits.

That trial took place accordingly, and on an appeal preferred the Principal Sadr Amín again decided that the suit was barred.

Whether the Principal Sadr Amín would have been justified in reviewing that order if nothing had been done upon it, is one question, but it seems clear that he had no power to reverse an order of a co-ordinate Court which had determined the precise question, after the suit had proceeded to its conclusion in pursuance of that order.

His order dismissing the suit as estopped by decree, must, therefore, be reversed, and the suit remanded for disposal upon the evidence, but without expressing any opinion as to the propriety in other respects of the order passed.

(a) Present : Frere and Holloway, JJ.

1865. March 11. S. A. No. 320 of 1864.

No appeal lies from an order passed in the course of a suit, and if the High Court are unable to receive such an appeal it seems abundantly clear that an inferior Court cannot.

The costs of this appeal will be costs in the cause.

Suit remanded.

Appellate Jurisdiction (a)

Regula Appeal No. 66 *of* 1864.

CHERACHOM VITTIL AYISHA KUTTI UMAH......*Appellant.*

VALIA PUDIAKEL BIATHU UMAH (mother of KALIVETTI KUSHI ALI KUTTI) and others. } *Respondents.*

According to Mahomedan law the consent of the heirs can validate a testamentary disposition of property in excess of one-third of the property of the testator, if the consent be given after the death of the testator. But if the consent be given during the life-time of the testator it wil. not render valid the alienation, for it is an assent given before the establishment of their own rights.

1865. March 20. R. A. No. 66 of 1864.

THIS was a regular appeal from the decree of H. D. Cook, the Civil Judge of Calicut, in Original Suit No. 3 of 1861.

Mayne, for the appellant, the plaintiff.

Karundkara Menavan, for the respondents, the 2nd, 3rd, 5th and 7th defendants.

The Court delivered the following

JUDGMENT:—The original suit was brought by plaintiff, widow of one Ali Kutti, deceased, to obtain $\frac{1}{32}$th share of her deceased husband's estate, her legal share by the Mahomedan law.

The eighth defendant, who appears to have been placed in possession of Ali Kutti's property on his departure to Mecca, answered that the plaintiff was only entitled to rupees 1,000 according to the karar executed by the deceased previously to his departure; that this karar was signed by all the heirs and cannot therefore be against the Mahomedan law; that after the death of Ali Kutti he offered to pay her the rupees 1,000, which alone remained to be delivered, but that she refused to receive them.

(a) Present: Holloway and Innes, JJ.

In a judgment delivered in a suit precisely similar in its circumstances to the present, the Civil Judge treated the document as a contract into which all the members of the family entered as to what was to be done with the property in case of the non-return of its owner. He thought it impossible for any of those who signed it to dispute it. He further thought that it could not be a will, because a man does not get the signature of his heirs to his will.

The parties in this case have all litigated on the admission that the Mahomedan Law is the law applicable. The relative rights of plaintiff and defendants according to that law are the questions for determination.

We are quite unable to agree with the Civil Judge that the document before us is not a will. The deceased recites as the reason for making it, that "as it is impossible to see when the life of man will end, I now declare my intentions as follows:" It seems to us that no words could more clearly express an intention of making a testamentary bequest. The words too are of importance as showing that the writer was not contracting with any one, but declaring his will as to the disposition of his property in case of death. These words override the whole of the rest of the document, which is, moreover, quite consistent with the intent to execute a will but wholly inconsistent with the notion of an irrevocable deed.

Referring to the schedule (para. 9) he declares himself during his life a trustee of the income for the chanting of prayers over his father's tomb, and his heirs trustees of the said income for the chanting of prayers after his own death over his own tomb. The corpus of the property he still keeps in his own hands. No question has arisen in appeal as to this bequest, because it is clear that it does not amount to one-third of the property.

Clause 6 shows clearly that there was no gift *inter-vivos* of any part of this property, and the doctrine of Mahomedan Law, therefore, peculiarly rigid in its demand of absolute delivery and acceptance, need scarcely be applied. It is quite clear that on Ali Kutti's death all

1865. March 20. R. A. No. 66 of 1864.

the property was at his own absolute disposal. It would have been quite competent to him during his life, saving some exceptions as to his bodily health and the proximity of death, not now necessary to be considered, to have alienated every particle of this property, but it is an inflexible principle of Mahomedan Law that there can be no gift to take effect in future. The example of a wholly invalid gift put in the *Hedaya* (*a*) "I constitute you proprietor of this article on the morrow," shows this very clearly. It is impossible, therefore, to treat these dispositions as gifts. The writer did not intend to give and he did not give. He carefully provides against the possibility of a supposition that he had put his property out of his own control. As a deed, therefore, this document would be altogether invalid, and simply because it professes to convey rights to arise at a future time.

The chapter of the *Hedaya*, which we have already quoted, shows that, as in the case of most other nations, the Mahomedans have to a certain limited extent permitted the disposition of porperty by will. The author shows that, *primâ facie*, such testamentary disposition is more opposed to legal principle even than a gift to vest in future, because at the time of vesting, the property has actually passed from the donor. He, however, on the whole vindicates this limited testamentary power, because it is desirable that men should be enabled, when warned by the approach of death, to supply their deficiencies. It is then declared, that one-third of the estate is the utmost which can be diverted at the pleasure of the testator from the legal heirs, and for this a precept of the prophet himself is quoted. *His* words do not encourage testamentary disposition but permit it to the extent of a third.

The commentator then considers how the consent of heirs can validate a testamentary disposition of property in excess of one-third, and the doctrine precisely meeting the present case is: "Their consent indeed during the life-time of the testator is not regarded, for this is an assent previous to the establishment of their right; they are therefore at

(*a*) Vol. IV, 467.

1865. March 11. R. A. No. 66 of 1864.

trine of Mahomedan law, we have no hesitation in saying that it is at variance with all the authorities both native and European. As, however, four years quiescence after the death of the testator is given as one reason for the decision it may be that this was thought sufficient evidence, on the favorite doctrine of acquiescence, of subsequent assent. The case is, however, at the best an unsatisfactory one, the reasoning throughout being very singular.

It being clear that this will is in Mahomedan law altogether invalid in so far as it devises to some of the heirs to the exclusion of others, the decree of the Civil Judge must be reversed, an account taken of the property of the deceased testator with the exception of that devised to the mosque, which, being a devise to strangers and not exceeding one-third of the property, must be upheld, and the legal share according to Mahomedan law awarded to plaintiff. That legal share must for the persent be taken at one-twenty-fourth as it is not denied that, save for the defence, which has been shown to be unavailing, she would by Mahomedan law be entitled to that share. In the great uncertainty of the parties as to the law, we think that there should be no costs.

Appeal allowed.

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liberty to annul it on the death of the testator. It is otherwise where the consent is given after the event, for as this is an assent subsequent to the establishment of their right, they are not afterwards at liberty to annul it." This doctrine is unquestionably a logical consequence of the impossibility of giving that which we have not and of the invalidity of a gift to take effect in futuro. Further, the alienation of one-third to a portion of the heirs will not be legal without the assent of the other heirs subsequently to the death of the testator, because their benefits already sufficiently secured by the law are not within the reason of the rule on which testamentary disposition is established, and such a bequest would, as the certain occasion of family dissension, be opposed to public policy. In this case it is quite clear that there was no assent of the plaintiff subsequently to the death. Not only is none such alleged, but her refusal to assent to the provision made for her is positively asserted.

It is quite clear, therefore, that this document is as a will wholly invalid as against the testator's heirs. If a mere deed of arrangement, as the Civil Judge seems to think its operation would cease at its author's death. There is no pretence for calling it a contract, but if it were, it is quite clear on the principles of Mahomedan law that the plaintiff could not validly dispose of property which had never vested in her. The passage of the *Hedaya* above quoted clearly shows this. Something was said of the plaintiff's receipt of a jewel in accordance with the provisions of this document. If there was gift and acceptance during the life-time of her husband, that was a valid gift to her, but her acceptance of it could in no way empower her husband to deprive her of the legal share of his property, if it once vested in the heirs by Mahomedan law.

The doctrine here enunciated has been upheld in numerous cases (In I of 1820, 1 Sel. Dec. 254, V. Beng. Sudr Dec. 287 and p. 66 of Sir E. Hyde East's notes). There is one case from the North West Provinces (VI Dec. Sudr N. W. p. 127) which (at page 129,) seems to contain the doctrine that the signature of the heir to the will is a sufficient assent, and if it was intended to lay this down as the doc

Original Jurisdiction (a)

The Lady Jocelyn.

Salvage—Adequate reward for service.

In estimating the value of salvage service the Court is bound to consider the time, labour, skill, enterprise and risk of the salvors, as well as the value of the property engaged in the service, and also the degree of danger from which the property is rescued and the value of the property so rescued.

Steam boats are entitled to a higher rate of reward than other vessels by reason of the promptness with which they are enabled to render services in such cases.

THIS was a cause of damage for salvage services promoted by the owners of the Screw Steam Ship the *Euphrates* against the *Lady Jocelyn* Steam Ship. 1865. *March 24.*

The libel on the part of the plaintiff set forth that the *Euphrates* was lying in the Madras Roads on the 22nd January, 1865, having on that day arrived from Calcutta and being bound to proceed to Bombay, and had on board a valuable cargo. The agent of the *Lady Jocelyn* applied to the agent of the *Euphrates* on the next morning for assistance, representing that the *Lady Jocelyn* had gone ashore on the Pulicat shoal, about 14 miles to the northward of Madras, on the previous day, and that he was desirous that the *Euphrates* should be sent to assist her. The *Euphrates* was despatched without delay, and reached the Pulicat Shoal at 30 minutes past nine A. M. on the 23rd January, and found the *Lady Jocelyn* grounded and in a very perilous position upon a sand bank. The *Euphrates* anchored to seaward of the *Lady Jocelyn*, about a cable and a half distant in 23 feet of water, passed the hawser of the *Euphrates* on board the *Lady Jocelyn*, turned ahead and succeeded in moving her a little, got the end of the *Lady Jocelyn's* hawser on board and steamed out full power, Finding, after about six hours' steaming ahead at full power that the *Lady Jocelyn* was coming off rapidly and her engines working full speed astern, the *Euphrates* eased her

(a) Present: Scotland, C. J. and Bittleston, J.

1865. March 6. engines and bore up to the northward to recover the end of her cable and enable the *Lady Jocelyn* to pass clear astern of the *Euphrates* to the southward. No further assistance was required by the *Lady Jocelyn*, and both steamed into Madras Roads, where they anchored at ½ past seven P. M. The value of the *Euphrates* was £30,000, exclusive of the cargo, and the agreed value of the *Lady Jocelyn* her cargo and freight, was £120,000.

The answer of the defendants stated that three quarters of an hour before the *Lady Jocelyn* had got off the shoal and moved into deep water the *Euphrates* had ceased to tow her; that while the *Lady Jocelyn* was on the shoal the wind was light and the weather fair, and that by the means adopted on board the *Lady Jocelyn* of putting the cargo on shore with the view of lightening her she would have been got off the shoal without any assistance. It was also stated that there was an understanding between the agents of the *Euphrates* and the agents of the *Lady Jocelyn* that the former was to receive a reasonable remuneration whether the *Lady Jocelyn* should get off or not.

The agents of the *Euphrates* claimed Rupees 20,000 for the services rendered; and on the part of the *Lady Jocelyn*, Rupees 5,000 were offered. A sum of Rupees 7,500 and costs was tendered and now lodged in Court.

Mayne, for the *Euphrates*.

The Advocate General, for the *Lady Jocelyn*.

The Court having taken time to consider, delivered the following

JUDGMENT :—There is but one question for the decision of the Court; what is an adequate reward for the services rendered by the *Euphrates* to the *Lady Jocelyn* on the 23rd January last. During the hearing of the case it was at one time suggested on behalf of the *Lady Jocelyn* that the services had been rendered under an express contract whereby the *Euphrates* was to receive only a fair remuneration for actual labour and loss of time, excluding altogether from the computation the value of the service rendered to the *Lady Jocelyn*; but we intimated our opinion at once that no such interpretation could fairly be put upon

the letters which had passed between the parties—and when Mr. Arbuthnot was in the witness box he admitted, as might have been expected of him, that it was not his intention, at all events, to exclude all consideration of the value of the property saved, if the *Euphrates* should succeed in getting the *Lady Jocelyn* off the shoal. We are not, therefore, in this case relieved by any special agreement between the parties from the necessity of estimating for ourselves what is a sufficient remuneration for the services rendered by the *Euphrates* to the *Lady Jocelyn* on the occasion in question. 1865. *March* 24.

The Court of Admiralty has not attempted to lay down any definite rules as to the amount to be awarded in salvage cases. The circumstances vary too much in different cases to allow of definite rules on the subject; but the general principles by which the Court is governed in estimating the value of salvage services are well settled; and the matters which the Court is bound to weigh and consider with the view of endeavouring to fix a just amount of reward are the time, the labour, the skill and enterprise of the salvors, the risk incurred by them and the value of the property engaged in the salvage service on the one hand, and on the other the degree of danger from which the property is rescued and the value of that property; remembering also, to use Dr. Lushington's language in the *Otto Herman(a)* "that the Court always looks in the particular circumstances of the case to see if the reward is adequate to encourage assistance in future cases."

In the present case there is happily very little dispute about the facts. At about a quarter to four in the afternoon of the 22nd January the *Lady Jocelyn* struck on the Pulicat shoal, she being then under steam and with canvas on two masts. Her engines were immediately put at full speed ahead, for 5 minutes or more, and were then reversed at full power but without effect; and she remained on the shoal till about ¼ to 5 the following afternoon. She was discharging cargo from half past seven in the evening till four in the morning, and again from about six till she came off the shoal. That evening she was unable to carry out an

(*a*) 33 L. J. Ad. 191.

1865. March 24.

anchor as two boats lowered for the purpose were swamped: but the following morning she did so. About seven in the evening a message was despatched to Madras for the assistance of a steamer and on the following morning at 9-30 the *Euphrates* came up. A hawser of the *Euphrates* was sent on board the *Lady Jocelyn* and having been made fast the *Euphrates* began towing about eleven and continued towing till one o'clock but not at full power. One Captain says that the hawser parted and was an old one and not sound. The Captain of the *Euphrates* says it was a good sound hawser but not large or strong enough to enable him to steam at full power though he thinks that during the first towing, between eleven and one, the *Lady Jocelyn* had moved a little. But the difference as to the hawser is not very material. A stronger one was furnished by the *Lady Jocelyn*, and then for two hours the *Euphrates* towed again at full power. During this period, according to the evidence of her Captain, the *Lady Jocelyn* moved 300 or 400 feet, or as the Captain of the *Euphrates* puts it, two cables length. At about half past three the latter states that the *Lady Jocelyn* was evidently coming afloat and then he eased his engines and bore to the northward and did what was necessary in his judgment to avoid a collision. This, we think, accounts sufficiently for the statement of Captain Stewart, that for the last three quarters of an hour before the *Lady Jocelyn* came off the *Euphrates* was not towing. Thus it appears that the *Euphrates* was actually engaged only between eight and nine hours and, the weather being quite fine the whole time, it cannot be said that any special risk was incurred. But the proximity to the Pulicat shore and to the *Lady Jocelyn* during the performance of this service (the wind blowing towards the shore) was necessarily such as to involve some degree of risk. Not immediate risk but that which Dr. Lushington in the *Ella Constance*(a) describes as "a possible contingency that serious consequences might have ensued;" if, for example her machinery had got disabled or bad weather had come on. Then her value also was considerable (£30,000) her cargo being worth about £35,000 more, and the number of persons employed large—viz., the captain, 3 mates, 3 engineers, a clerk

(a) 33 L. J. Ad. 193.

35 firemen and lascars; and these are circumstances to be considered; for the Court must include in its award not only a reasonable remuneration to the owners for the services of the vessel, but a reasonable remuneration also to each person engaged for the services rendered by him. 1865. *March 24.*

But now what was the condition of the *Lady Jocelyn*? That she was *in peril* is not denied, but Mr. Franklin and Mr. Dalrymple tell us that in their opinion she was not in great peril; and they concur in opinion with Captain Stewart that probably by further lightening her and working her own engines she would have come off the shoal even without assistance, Mr. Franklin thinks in a few more hours probably, but Mr. Dalrymple finds it impossible to say how long the operation of getting herself off would have occupied. It does not seem to us very necessary to enter into these speculations. So long as the *Lady Jocelyn* was on the shoal, she was, we venture to think, in a position of very considerable peril. The prevalent wind at that season of the year is from the N. and N. E., and it appears clearly from the evidence of the Master Attendant that if it had begun to blow hard the *Lady Jocelyn* could never have got off that shoal. The case is one not perhaps of very imminent danger but one of great urgency, and it cannot be doubted that it was of the utmost importance that there should be no loss of time in rescuing her, if possible, from that position. And it is the great power possessed by steam boats of rendering services with rapidity which is noticed by Dr. Lushington in the *Ella Constance* case as that which entitles them to a higher rate of reward than other vessels.(c) That the *Lady Jocelyn* was, in fact, rescued from a position of considerable peril by the timely exertions of the *Euphrates*, we do not entertain any doubt; and seeing that the value of the property saved is no less than £102,000, we think that having reference to the decisions in the High Court of Admiralty in similar cases (such as the *Himalaya* before Dr. Lushington in 1858, *(d)* and the *William Beckford* before Sir William Scott in 1800) *(e)* we should not be justified in awarding less than Rupees 12,000 which we consider a fair but moderate amount of remuneration for the services rendered. We must, therefore, pronounce against the tender and award Rupees 12,000 with costs.

(c) 33 L. J. Ad. 193. (d) 1 Swaby 515. (e) 3 Ch. Robinson 355.

Appellate Jurisdiction (a)

Special Appeal No. 6 *of* 1865.

DANTULU'RI RA'YAPPARA'Z.................. ...*Appellant.*
MALLAPUDI RA'YUDU and others............*Respondents.*

Plaintiff sued to enforce a gift to him of immoveable property by a woman living under his guardianship as against her husband. *Held* that such taking of the woman's property by her kinsman is wholly repugnant to Hindu Law.

Quære, Can a woman, without the consent of her husband, during coverture, absolutely alienate her own landed property?

1865. *March* 25. *S. A. No.* 6 *of* 1865.

THIS was a special appeal from the decision of J. R. Kindersley, the Acting Civil Judge of Rajahmundry, in Appeal Suits Nos. 316 of 1863 and 48 of 1864, reversing the decree of the Principal Sadr Amín in Original Suit No. 50 of 1862.

Sloan, for the special appellant, the plaintiff.

Srínivásachâriyár, for the 3rd special respondent, the 3rd defendant.

The Court delivered the following

JUDGMENT :—This is a suit to enforce a gift to plaintiff by a woman living under his guardianship as against her husband.

The separate property of the woman was denied, but the Civil Judge, on the ground that the Inam Commissioner's puttah was conclusive upon that subject, declined entering upon that question ; and, if his decree against the plaintiff is nct sustainable, it will be necessary to direct an inquiry upon that matter, as we have several times held this view of the Inam Commissioner's functions to be unsustainable. The Judge dismissed the plaintiff's suit, because he held the gratuitous alienation of the woman's special property unenforceable against the husband.

(a) Present ; Holloway and Innes, J J.

As to the absolute power of the woman to alienate her special property, *Kullammál* v. *Kuppu Pillai* (b) was quoted. The only point absolutely decided in that case was that a person ousted from property was entitled, under Section 15 of the Limitation Act, to be replaced in possession if he applied within six months. The case was absolutely decided upon this simple principle.

1865. *March* 25. *S. A. No.* 6 *of* 1865.

With the view, however, of preventing further litigation, the Court laid down the following proposition, which is the result of the judgment:—A widow is not, as to her separate property, subject to the restrictions upon alienation, that clearly apply to property which she takes through her husband upon the death of that husband. Taking, therefore, either the point actually decided in that case or the question upon which the Court expressed its opinion, the present case is wholly different, and keeping in view the following passage from *Colebrooke* (Obl. Sec. 611) which was not quoted in the argument, "and she is subject to his control even in regard to her peculiar and separate property," a passage written by this greatest of all authorities with all the texts from *Jimuta Váhana* and his own *Digest* before him, and looking also at the repeated texts of Hindu Law as to the absolute dependence as to every act of the woman, and at the fact, abundantly clear from the history of our own law, that so-called absolute property is quite consistent with restricted power of alienation, and that this is still more conspicuously the case with the Hindu Law, we could not, without the greatest consideration, conclude that a woman can, without the consent of her husband, during coverture, absolutely alienate even her own landed property.

Here, however, it is not necessary to decide this question, because it is quite clear that this taking of the woman's property by the plaintiff, her kinsman, is wholly repugnant to the Hindu Law.

The *Mitácshara* (Cap. II. Sec. 11, Articles 32 and 33) shows that for certain urgent needs the husband may take the woman's separate property, but that any other relative

(b) 1 Mad. H. C. R. 85.

1865. March 25. S. A. No. 6 of 1865.

who takes it is to be punished for theft; and the *Dayabhága* (Cap. IV. Sec. 1, Articles 23 and 24), while as is usual with authors of that school asserting a more extensive power, still renders it obligatory upon her relative so taking her property even with her consent to restore it when he becomes rich. It is quite clear, too, from the context that the taking must be only upon the ground of urgent and proved necessity. This, therefore, is a case in which without any allegation of necessity, if such necessity could in the lifetime of the woman's husband avail the plaintiff, he seeks through the agency of the Courts to do that which the Hindu Law wholly forbids his doing—take to himself the property of his kinswoman.

Looking at the existent guardianship, whether self-imposed or not we are not informed, it is quite clear, that it would be difficult to establish a contract against the woman and equally difficult to conclude that there was such freedom of will as could alone render a contract valid. The transaction, so far as these pleadings disclose it, would be one of very doubtful efficacy. On these grounds, therefore, we dismiss this special appeal with costs.

Appeal dismissed.

Appellate Jurisdiction (a)

Special Appeal No. 71 *of* 1865.

IBRA'I BYA'RI......................................*Appellant.*

Revd. H. A. KAUNDINYA................................*Respondent.*

Where the plaintiff alleged that he was in possession of property and prayed the Court to cause the registry to be altered into his name, without alleging that the proper authorities had improperly refused to make the entry, and without joining as a defendant the only person who had power so to do: *Held* that the plaintiff's suit ought to have been dismissed.

THIS was a special appeal from the decision of M. J. Walhouse, the Civil Judge of Mangalore, in Appeal Suit No. 334 of 1863, confirming the decree of the Principal Sadr Amín in Original Suit No. 18 of 1861.

1865. *March* 30. *S. A. No.* 71 *of* 1865.

Srínivásachári yár, for the special appellant, the fifth defendant.

G. E. Branson, for the special respondent, the plaintiff.

The Court delivered the following

JUDGMENT:—In this case the plaintiff alleged that he was in possession of the property and prayed the Court to cause the registry to be altered into his name. This too he did without any allegation that the proper authorities had improperly refused to make the entry, and without joining the only person who had power to do the act.

A Court proceeding on proper principles would at once have told the plaintiff to be satisfied with his possession and not attempt to put the Court in motion. Either the plaintiff has all that the Court can give him or, not having got possession, he is seeking to obtain it indirectly and procure improper advantage by depriving defendants of the shield which their possession would rightfully afford them. In every point of view such suits should not be permitted, as this Court has frequently decided.

In this case possession has been asserted on both sides. With the sort of evidence, oral and documentary, presented to our Courts, the decision of suits is quite difficult enough,

(a) Present: Frere and Holloway, J J.

1865.
March 30.
S. A. No. 71
of 1865.

even where the admitted fact of possession narrows the range and simplifies the nature of the inquiry. Such suits as these, by persons alleging that they have possession which has not been disturbed, are wholly unauthorized by the law, and would, if permitted, compel the Court to embark upon an inquiry of a purely speculative character. It is as much reason as law to tell the person in possession that he has no right to resort to the Courts.

We trust that the principles here laid down will be followed by all the Courts in Canara, in which suits of the simplest character are by the procedure of those Courts, on which we have frequently animadverted, so confused with extraneous matter that it becomes all but impossible to understand what is the matter in dispute.

The decrees of the Lower Courts will, therefore, be reversed but without costs and without expressing any opinion as to the possession of or the title to the property.

Appeal allowed.

Appellate Jurisdiction (a)

Special Appeal No. 72 *of* 1865.

PA'PAMMAL.................................*Appellant.*

RA'MASWA'MI CHETTI.......................*Respondent.*

Plaintiff brought a suit to procure delivery to her of a share of land purchased with money subject to the provisions of a deed of partition executed by her husband and the undivided members of his family. Plaintiff's husband has been since 1854 absent in a foreign country.

Held that the plaintiff sufficiently represented her absent and divided husband to enable her to sue for his share.

1865. *April* 1. *S. A. No.* 72 *of* 1865.

THIS was a special appeal from the decision of G. Ellis, the Civil Judge of Cuddalore, in Appeal No. 161 of 1862, reversing the decree of the District Munsif of Cuddalore, in Original Suit No. 2,061 of 1860.

The special appellant, the plaintiff, appeared in person.

Miller, for the special respondent, the first defendant.

The Court delivered the following

JUDGMENT:—This was a suit brought by plaintiff to procure the delivery to her of a share of land alleged to have been purchased with money subject to the provisions of a partition deed executed by her husband and the undivided members of his family. It appears that the husband has been since 1854 absent in a foreign country.

The Munsif considered the defence of first defendant that there had been an assignment of the property to him false and decreed for plaintiff.

The Civil Judge reversed this decree because the husband had not been absent sufficiently long to raise a presumption of his death.

It seems to us that the real question is not whether the inheritance has devolved upon the plaintiff by her husband's death, but whether in his absence, with the statute of limitations continuing to run against him, she is justified in

(a) Present: Frere and Holloway, J J.

1865. April 1. S. A. No. 72 of 1865.

suing for the protection of his present and her prospective rights as against his former co-parceners from whom he is now divided. That the wife represents for many purposes her absent husband and in the most solemn transactions there can be no question. In the Ramnad case, (a) we exemplifid this representation from the highest authorities. If, therefore, we had been left to decide this case solely upon analogy, we should have considered that the wife sufficiently represented the absent and divided husband to entitle her to sue for his share.

There is, however, express authority upon which, as it seems to us, her right is unquestionable. In Colebrooke's Digest, p. 575, Sec. 450, Vishnu says "The king should guard the property of an infant and the effects of the husband and wife in the absence of the husband." This passage, explained by the context, shows that it is for the king to guard the property of the husband and wife in the absence of the husband, unless the husband has co-parceners, for in case of the existence of such co-parceners, Section 453 shows that it is their duty to keep the share of the absent co-parcener in tact. If it is the duty of the king to guard, it must be the duty of the Courts of Justice, which, in such matters, represent the king, to do so, and it seems to us that this is a clear authority for the present suit. The husband is absent, the persons against whom the property is to be protected are of course the divided co-parceners, and we are of opinion that it would be a positive denial of justice to refuse to the wife a right of action, the right of representing, the necessity for guarding which the law has imposed upon the king.

We, therefore, reverse the decree of the Civil Judge upon this preliminary point, and remand the case for decision upon the facts.

The costs of this appeal will be paid by the party finally unsuccessful, and the Civil Judge will so provide in his decree.

Suit remanded.

(a) 2 H. C. Rep. 206.

Appellate Jurisdiction (a)

Special Appeal No. 360 *of* 1864.

NA'GAPPA UDAPA..............................*Appellant.*

SUBBA SA'STRY..............................*Respondent.*

An adoption by a widower is valid according to Hindu Law.

THIS was a special appeal from the decision of Srinivása Row, the Principal Sadr Amín of Mangalore, in Appeal No. 271 of 1863, confirming the decree of the Court of the District Munsif of Kundapur in Original Suit No. 220 of 1859. 1865. *April* 20. *S. A. No.* 360 *of* 1864.

Srinivásacháriyár, for the special appellant, the 1st defendant.

Tirumalacháriyár, for the special respondent, the plaintiff.

The Court delivered the following

JUDGMENT:—This was a suit to recover the property of Kristna Sástry, the plaintiff's uncle, now deceased.

The 1st defendant, as father and natural guardian of the 2nd defendant a minor, pleaded that Kristna Sástry adopted the 2nd defendant during his life-time, and that the latter is, therefore, entitled to the estate of the deceased, whose family was divided from that of the plaintiff.

The District Munsif passed judgment in favor of the plaintiff on the ground that the late Kristna Sástry was a widower, and consequently by Hindu Law incompetent to adopt. This decision was confirmed in appeal by the Principal Sadr Amín.

In this case the Principal Sadr Amín has expressly found that the adoption of the 2nd defendant by the late Kristna Sástry actually took place. The only question before us is whether this adoption must be held to be invalid on the ground that Kristna Sástry was at the time a widower.

(a) Present; Frere and Innes, J. J.

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On this point we observe that the opinion which the Principal Sadr Amín has formed with reference to the subject appears to be founded chiefly, if not entirely, on a passage in *Mr. Justice Strange's Manual of Hindu Law, Section* 61, in which he quotes as his authority the *Datta Mimansa* of Somanáth. We cannot find, however, that this latter work has been regarded at any time as of much weight on points of Hindu Law, nor is it specified by Mr Justice Strange himself among the authorities, of which a list is given at the commencement of his *Manual.* On the other hand, the views expressed on this point by *Sir Thomas Strange,* Vol. I, page 65, Ed. 1825 ; *by Sir W. H. Macnaghten,* Chapter VI, " *Of adoption,*" page 66 ; by *Colebrooke* in his *Digest,* Vol. III, page 252 ; and by *Southerland in his Treatise on the Law of Adoption ; Appendix,* Note IV, are all opposed to that now enunciated by the Principal Sadr Amín, and are in favor of the validity of an adoption made by a widower.

We think, therefore, that the pleader for the plaintiff has failed to make out his case, or to show that an adoption by a widower, as in this instance, presents any exception to the general rule of Hindu Law, which allows the privilege of making such adoption to one destitute of legitimate male issue.

We resolve accordingly to reverse the judgment of the Principal Sadr Amín and to dismiss the claim of the plaintiff for the recovery of the estate of the late Kristna Sástry, as against his adopted son the 2nd defendant. The costs of suit will, however, be charged to the respective parties throughout the entire case.

Appeal allowed.

Appellate Jurisdiction (a)

Regular Appeal No. 26 *of* 1862.

SRI GAJAPATY HARI KRISHNA DEV'I GA'RU......*Appellant.*

SRI GAJAPATY RADHIKA PATTA MAHA'DE'VI GARU.. } *Respondent.*

Regular Appeal No. 52 *of* 1863.

SRI GAGA'PATY NILAMANI PATTA MAHA' DEVI GARU.. } *Appellant.*

SRI GAJAPATY RADHIKA PATTA MAHA'DE'VI GARU and another.................................. } *Respondents.*

The illegitimate son of one of the mixed classes between the second and third of the regenerate classes has no title to inherit by the ordinary rules of Hindu Law, and the circumstance that the father was illegitimate does not alter the law.

An agreement entered into by two brothers, who never were constituted by Hindu Law members of an undivided family, provided for the mode in which self-acquired property to a moiety of which they were each entitled should be managed during their lives, for the right of survivorship, and for its descent upon the death of the survivor. One clause of the agreement, literally translated, was in these words:—" To the married wives of both of us if there is not male offspring in the event of there being sons not born in wedlock must divide into equal shares for their own benefit." Upon the construction of this clause, *held* that the estate was to be equally divided amongst the wives and the sons born in concubinage.

THESE were regular appeals from the decision of T. J. Knox, the Civil Judge of Chicacole, in Original Suits Nos. 62 and 72 of 1861. 1865. *April* 22. *R. A. No.* 26 *of* 1862, *and R. A. No.* 52 *of* 1863.

Mayne, G. E. Branson, Sloan, and Srínivásachåriyår appeared for the parties.

The Court delivered the following

JUDGMENT:—These are regular appeals from decrees of the Civil Judge of Chicacole. The question at issue in both of them is, the proper mode of disposing of an estate called the Tekkály estate.

In 26 of 1862 the plaintiff alleges himself a son of the deceased Gopinádha Dévu, the person last seized, by a

(a) Present: Frere and Holloway, J J.

1865. April 22. R. A. No. 26 of 1862, and R. A. No. 52 of 1863.

Gándharva marriage, He however, alleges himself an illegitimate son of the deceased and claims to succeed by the terms of a certain agreement, dated 29th July 1844.

The defendant, the widow of Gopínádha, answered that plaintiff was not the son by a Gándharva marriage, but by a concubine, and contended that so long as there are widows lawfully married by the terms of the agreement, the property cannot descend to illegitimate sons. She further contended that the agreement could not be binding upon her.

The Civil Judge dismissed the suit. He seemed to consider that Gopinádha was not a Kshatriya, but that he was reputed to be one, that the circumstances rather affected his purity of breeding than his caste. As to the agreement, he considered that its construction was in favor of plaintiff, but that it could not be intended to disinherit the widow and the female issue; moreover he seems to consider that it would not be binding as against the widow. He further considered that, even if plaintiff's father was an outcast or a Sudra, plaintiff could inherit only on the failure of daughters or daughter's sons.

The Suit No. 52 of 1863 was brought by the widow of one Krishnachandra Dévu to recover from one Patta Mahádévi, widow of one Gopinádha Dévu, one-half of the zemindari of Tekkály with mesne profits which plaintiff assessed at Rupees 46,876-12-0. The plaintiff alleged that Krishnachandra and Gopinádha by arrangement between them were each entitled to the enjoyment of, and did actually enjoy, one-half of the zemindári. She further alleged that, owing to fraudulent contrivance on the part of the defendant, the estate property was by the late Sadr Court put into defendant's possession.

The defendant, admitting the execution of the agreement alleged, stated that its effect was to make Gopinádha, the survivor, the sole owner, and that he having died, she as his widow succeeds, and that the plaintiff is not entitled to any share.

The Civil Judge held the two deceased Zemindars to be members of an undivided Hindu family, and negativing the allegation of division, he dismissed the suit with costs.

The question for our decision is, whether the two husbands deceased were undivided brothers in the sense of Hindu Law, or whether they became so by the contract entered into between them. 1865. *April* 22. *R. A. No.* 26 *of* 1862, *and R. A. No.* 52 *of* 1863.

The property was the self-acquisition of Padmanábha Dévu, the father of the husbands both of plaintiff and defendant. Upon his death, in consequence of the assumed illegitimacy of the two sons, the property was put into the possession of Níla Patta Mahádévi, his regularly married wife. Gopinádha who had arrived at manhood was not inclined to accept this position, and the property being much encumbered, and being about to be brought to a sale, Patta Mahádévi on 26th November 1838 addressed to the Collector of Ganjam a petition to the terms of which both Gopinádha and Krishnachandra assented. After reciting that she had reconciled her two sons (they were her husband's sons), she declares them equally entitled to the Tekkály zemindari; that the whole management is to be held by Gopinádha until Krishnachandra attains his majority; that then one-half shall be given up to him and one-half retained as his own by Gopinádha. It then goes on to provide for the expenses of the household of each of them and for the equal division of the surplus after the discharge of these and other expenses. The whole title therefore of Gopinádha and Krishnachandra arose from this deed of gift. The estate was not one of inheritance which descended to them as undivided brothers according to the rules of Hindu Law. These rules have manifestly therefore no application to the question before us. The nature of the estate taken is to be determined by the terms of the deed of gift. In the construction too of such deeds, the disposition of the Courts should be, as it is in English Courts, to incline against the construction that the deed was intended to create a joint tenancy with the consequent hardships of the right of survivorship. The case is wholly different from that of a family rendered undivided by the incidents of birth. This rule of construction, however, is not in the present case required. This is no grant of an estate to two without words of severance. On the contrary, the whole agreement distinctly shows that each of the donees was entitled to a half, and that the half was to be positively delivered on the

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attainment of his majority to Krishnachandra, who was in the meantime to have a share equal to that of Gopinádha in the net income of the estate. The only unity is that of management. This deed of gift therefore clearly vested one-half of the zemindari in each of the brothers.

The next document to be considered is the agreement between the two Zemindars, dated 29th July 1844. This document recites that, to prevent inconvenience of various kinds, the division into two parts should be postponed, that the orders to be issued should still run in the name of Gopináda, but that both of them should manage revenue affairs, sign receipts, and remit the collections to the common treasury when they amount to Rupees 2,000. This deed still recognizes the present right of each to a half share and provides for each of the parties maintaining a revenue establishment out of the common fund. There is then a provision for the event of the elder predeceasing the younger, but the event which actually happened, that of the younger predeceasing the elder, is not in terms provided for, but the words " if any one of us or any of our sons by our legal wives should succeed to the taluk under the aforesaid terms" show the plain intent that the survivor of them should for his life inherit the whole property.

The Civil Judge considered the evidence to show that each had managed his own portion, but that there had been no legal division. It seems tolerably clear that this is the case, but it is comparatively unimportant, because it seems abundantly clear that they never by Hindu Law constituted an undivided family, and that their status by the deed of gift and by their own agreement was clearly not that of joint tenants. Each had a vested interest in a half share, but they chose to provide by their agreement for the right of survivorship ; we are therefore clearly of opinion that the decree of the Civil Judge is wrong and must on this point be reversed.

This would dispose of the Appeal 52 of 1863, were it not that the plaintiff in 26 of 1862 has appeared and asserted his rights to the whole estate under the agreement of 1844, and it will be necessary therefore to deal with the questions involved in that appeal. In this case the ques-

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tion mainly argued at the bar was, the validity or invalidity of the marriage of Gopinádha with the defendant, and the right of the plaintiff to succeed was put rather upon the general grounds of Hindu Law than upon the agreement of 1844 about which very little was said in the agreement. We have not therefore had the advantage of much assistance from the bar upon its construction. Mr. Mayne in 26 of 1862 said generally that the agreement determined the question in his favor, and Mr. Sloan for the appellant in 52 of 1863 said as generally that by the agreement the widows were to take.

Dealing first with the caste of Gopinádha, we cannot but come to the conclusion that his mother was not a Kshatriya. We consider the evidence satisfactorily to show that she was a woman of the Karnam caste. The evidence of the third witness for the plaintiff is peculiarly strong. He alleges, and has been nowhere distinctly contradicted, that the woman was his own aunt. The other witnesses for the plaintiff seem also entitled from the definiteness with which they have spoken to more weight than those for the defence. Moreover they receive the very important corroboration derivable from the conduct of Gopinádha. On Gajapati Padmanábha's death, the Collector reported that both his sons were illegitimate. The whole course of Gopinádha's conduct shows him a man not likely to acquiesce in that decision, if he could, at the period at which the knowledge of the matter was perfect, successfully dispute it. Moreover it is to be observed that the defendant in this case, although animated by the desire to retain the property, and with the desire not less strong to assert her husband to have been a man of high caste, has nowhere expressly denied the plaintiff's allegation. It is impossible therefore not to be satisfied on the evidence in the case that Gopinádha must be taken to have been the illegitimate son of a Rájput by a woman of the Karnam caste. Now this name is attached to the third Hindu caste, the Vaīsyas, and also to any reputed Rájput of impure caste. His mother therefore was a Vaisyas certainly, and perhaps and more probably a woman of a mixed caste, inferior to the second but superior to the third of the castes of Manu. The whole subject is discussed in his ninth chapter.

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We are unable to adopt the view of the Civil Judge that concubinage and connexion by a Gándharva marriage are much the same thing. If there had been such a marriage with Sunni, the mother of plaintiff, it would have been necessary to consider, if Gopinádha was a Kshatriya, whether that marriage would not have been perfectly valid ; being clear, however, that he was not Kshatriya, it is plain that this privilegium of the second class cannot attach. It is unnecessary therefore to say, and we do not say, whether such a marriage of a Rájput would or would not have been valid. We see no reason, however, to believe that a marriage ceremony of any kind took place between Gopinádha and Sunni. In our view, she was a mere concubine, and probably one of many others, and the plaintiff is the reputed son of Gopinádha by her. He is therefore the illegitimate son of a man of one of the mixed classes, between the second and the third of the regenerate classes, and this being so, he has no title to inherit by the ordinary rules of Hindu Law (Moore's Ind. Ap. Vol. VII p. 18.)

We do not consider it necessary to discuss the Sadr case quoted. It was based entirely upon the Pundits' opinions, and it is quite clear that, if it intended to make a different rule of inheritance because the father of the claimant was illegitimate, it has been repeatedly overruled. So far as the matter is involved in the present question, the rule of inheritance *ex-parte paterná* depends entirely upon the caste of the father, and there is express authority that the illegitimate son of no caste above the Sudra is entitled to inherit. So far therefore as it depends upon the ordinary rules of law, there is no right in the plaintiff.

Recurring to the facts that the property was the self-acquired property of the husband of Patta Mahádevi, and that the whole title and interest of both Kristnachandra and Gopinadha were derived from her settlement, the property became their self-acquisition. We think that there can be no doubt whatever of the power of either of them to dispose of his own share either by will or by deed. There seems as little doubt that they might contract, as they have done by this agreement, which provides for the mode of management during their lives, for the right of

survivorship and for the mode in which upon the death of the survivor the property should descend. It is a contract for a valuable consideration upon which the contracting parties acted, and which, even if revocable, they never revoked. There seems no reason whatever to doubt that this contract is binding both upon those who made it and those who take or claim to take under them by inheritance. We have already disposed of the objection that the event which actually happened is not provided for, and the questions upon which the decision of this cause finally depends are:—

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I. What is the true construction of the document? What interests does it profess to convey, and to whom does it profess to convey them?

II. Is the plaintiff in 52 of 1863 and he in 26 of 1862 entitled to sue for the benefits, if any, so given?

To the construction of this document we have given repeated consideration. It is so singular in its structure, both logical and grammatical, that our opinion has continually wavered, and we have had the advantage of two diametrically opposite opinions from an intelligent Telugu Brahmin upon the construction. Each was supported by an argument, and each argument was at the period of its production equally cogent in the opinion of its author. In truth that construction is beset with difficulties. The first clause in its plain grammatical sense provides for the property going to such of the regularly married wives as are bearers of male issue, yet in summing up the provisions the writer supposes himself to have provided only two possible cases in which one of the families (కుటుంబము) should be excluded, that of it going either to one of themselves or to the sons of the regularly married wives of either of them. This, therefore, attenuates the argument that the wives were the primary object of the settlor's bounty. Then comes the clause upon which the present question depends. Its literal translation is "to the married wives of both of us if there is not male offspring in the event of there being sons not born in wedlock, must divide into equal shares for their own benefit." This is the natural

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force of a verb in the middle voice, and the question is, who are they who are so to divide for themselves? The mere proximity of the words "sons not born in wedlock" affords no argument whatever, for the verb ఉన్న agrees with the nominative case and forms a dependent clause exactly similar to the one preceding it. A pronoun must therefore be supplied, and if the illegitimate sons alone were to take it is almost impossible to conceive that వారు would not have been inserted. Moreover, recurring to the summary of the conditions and the cases in which the family (and the Telugu word applies to a married wife and children born in wedlock) was to be excluded, we have no hint of the possibility of their being entirely disinherited by the illegitimate sons. This construction therefore is neither accordant with the rules of logical nor with those of grammatical interpretation. Moreover, there is no reason grammatically for saying that the wives were to divide, because, as we have shown, it is most doubtful whether the antecedent of the pronoun వారికి (to them) in the preceding clause was not the sons who were born and not the wives who were the bearers. There is no reason therefore for giving any prominence to the regularly married wives because they were the subject of the preceding sentence. To declare the wives alone entitled would be as arbitrary grammatically as to declare the sons only entitled, although the reasons against the latter construction are on other considerations stronger.

Then comes a construction which was not even suggested at the bar. Is it not the more natural construction that the property shall, in case of the failure of male issue, be divided between the regularly married wives and the illegitimate children. In favor of the illegitimate sons taking something is the fact of their mention in this place at all. It is necessary, however, to observe that this argument is not so strong as to a sentence in the peninsular languages, as it would be in one couched in any of the European forms of speech. It would not be at all contrary to Telugu idiom to insert this phrase merely to point the distinction between the provision to be made for the

widows in case of the existence of offspring born in matrimony, and the case of the existence of the mere offspring of concubinage or casual connexion. We are of opinion, however, that this is the better construction, and we think that, so reading it, the document best meets the combined requirements of grammar and logic. In the sentence there are two nouns in dependent clauses, there is no reason for preferring either of them as antecedents of the pronoun to be supplied. Putting this construction upon it, the whole document reads reasonably. If legitimate sons, they will take and the excluded wife and family will receive maintenance. If no male offspring born in wedlock, then the wives and illegitimate children will divide. It is to be observed that the settlors were themselves illegitimate, and there is nothing unnatural in the provision so made.

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Then comes the question whether Gopinádha's wife, being a Kshatriya, can be entitled to share, because the marriage is, as is contended, illegal. We do not think that even if the marriage were illegal the argument could prevail, because in our view of the matter Gopinádha's wife would take as *persona designata*. The meaning is, the women to whom we are united by a regular marriage ceremony in contradistinction to those with whom they had casually, or more permanently but still irregularly connected themselves.

Even, if, therefore, the ceremony of marriage did not really constitute a valid marriage, we should consider this woman entitled to share because united to Gopinádha by a regular marriage ceremony. That she was so united, lived, and was treated as his wife, has been admitted on all hands, and we are perfectly satisfied that she comes both within the words and the meaning of the settlors.

We think also that there can be no doubt of the right to sue of the persons whom the settlors intended to benefit. They would have that right if the settlement had been by will, and wills have been introduced by analogy to deeds of gift.

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The decrees therefore in both these suits must be reversed, and a declaration made that on the true construction of the agreement the estate is to be equally divided between the wives and the sons born in concubinage. The defendant must pay the mesne profits upon the share finally found to belong to each plaintiff from the date of filing the suit and the costs, both original and appeal, in 52 of 1863. In 26 of 1862 there will be no costs. The Civil Judge will inquire who are the parties entitled on this construction and will make the present parties and all other claimants parties to that enquiry. This direction becomes necessary because in the course of the argument it was alleged that Krishnachandra also left a son not born in wedlock. The suit will be treated as a suit for the administration of an estate.

Decree reversed.

Appellate Jurisdiction (a)

Special Appeal No. 22 *of* 1865.

Tiruma'lathamma'l and 2 others.........*Appellants.*

Venkatara'manaiyan.........................*Respondent.*

Where the defendant alienated property in which he had merely a life interest: *Held* that the alienation was invalid as against the plaintiff who was entitled as reversioner. *Held* also that the plaintiff was entitled to a decree declaratory of his title under Section 15 of Act VIII of 1859.

Although the words of that Section are nearly identical with those of Section 50 of the English Chancery Amendment Act, it does not follow that in every case in which the latter Section is held to be inapplicable by the Courts of Chancery in England, the former will be held to be equally inapplicable in India. The application of Section 15 of Act VIII of 1859 must be viewed in connection with the system of procedure to which it belongs.

S. A. No 10 of 1865 distinguished.

1865. April 24. S. A. No. 22 of 1865.

THIS was a special appeal from the decision of T. Kristnaswami Aiyar, the Officiating Additional Principal Sadr Amín of Tanjore, in Appeal Suits Nos. 301 and 303 of 1864, modifying the decree of the Court of the District Munsif of Pápavinásam in Original Suit No. 700 of 1862.

(a) Present: Frere and Innes, JJ.

1865. April 24. S. A. No. 22 of 1865.

Mayne, and Karunákara Menavan, for the special appellants, the defendants.

Srínivásachúriyár, for the special respondent, the 2nd plaintiff.

The Court delivered the following

JUDGMENT :—This was a suit on for a decree declaratory of plaintiff's right to the reversion of certain lands and a house.

The Principal Sadr Amín in appeal held that the alienations made by the tenant for life were, as against plaintiff, invalid, and made the declaratory decree prayed for. In this special appeal it was argued before us that Section 15 of the Civil Procedure Code, under which declaratory decrees are made, did not contemplate cases of this nature, but was only applicable to cases in which the proprietary right has actually accrued, and that the Section merely means that in cases where a right has accrued and relief might be granted by placing the plaintiff in possession of such right, he may nevertheless limit his prayer to a request for a mere declaration of right without possession, and the Court may make a decree accordingly. The decree in Special Appeal No. 10 of 1865 was referred to in support of this view.

On the other side, the decree in Special Appeal No. 62 of 1862, 1 *High Court Reports*, page 206, was referred to as showing that declaratory decrees made in cases of this kind had been upheld by the High Court.

It does not appear from the report of the latter case whether the question of the plaintiff's right to a declaratory decree was raised in the special appeal, which seems to have been made by 2nd defendant against the provision in the decree of the Lower Court that the property sued for, which had been alienated to 2nd defendant by the tenant for life, should revert to the possession of the latter.

We think, however, that a declaratory decree was rightly made in the present case. It is true that in Eng-

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land the Courts of Chancery have refused to grant declaratory decrees in cases identical in their nature with this, and that as the 50th Section of the Chancery Amendment Act appears in the Civil Procedure Code with scarcely a word of alteration as Section 15, it might perhaps be supposed that if in any case that Section were held to be inapplicable by the Courts of Chancery, it would be equally inapplicable here. But we do not think that this is so. The application of the Section must be viewed in connection with the system of procedure to which it belongs.

Under the system of procedure of the Courts of Equity in England, an action of this kind would be unnecessary, because, under that system, testimony can be taken in anticipation of a suit and so perpetuated. In *Langdale* v. *Briggs*, 2 Jur. N. S. p. 992, Lord J. Turner said, "This Court entertains bills to perpetuate testimony upon the ground that future rights cannot be determined. If the Court has authority to declare future rights, upon what ground in the case of equitable estates are such bills hereafter to be maintained?"

In *Gosling* v. *Gosling*, 5, Jur. N. S. p 910, Vice-Chancellor Wood refused to make a declaratory decree in the lifetime of the tenant for life in regard to the interests of parties entitled in reversion. He observed that it was now a well settled rule that the Court had no power to make such a decree unless it were necessary to do so for the administration of an estate or in order to grant the plaintiff the relief to which he is entitled.

The reason of the rule is not stated, but it may be inferred that it was that given by Lord Justice Turner in *Langdale* v. *Briggs*; though there was this additional reason for applying it in the particular case (*Gosling* v. *Gosling*) that the parties who might become entitled in reversion were not then in existenee.

Now in India evidence cannot be taken until after a suit has been actually instituted; and if a suit by a reversioner for a declaration of title would not lie, he would have to wait until the death of the tenant for life, and

long ere that date the evidence upon which his case depended might be lost beyond the possibility of recovery. The reason, therefore, upon which the decisions in such cases proceed in England not applying in India, we think that the rule does not apply. As the decision in Special Appeal No. 10 of 1865 was referred to in support of this special appeal, we would observe that in that case plaintiff was in full possession of all his rights, and that the manifest object of his suit was to obtain a declaratory decree not in affirmation of his own title, but negativing that of defendants. We intimated that the Section seemed to contemplate those cases alone in which there was some wrong or inconvenience calling for relief, and in which the Court would be capable of granting of such relief were it sought for; and that that case being one in which there was nothing to remedy was not a case calling for a declaratory decree.

The present is clearly distinguishable from that case. To admit the present action and grant a declaratory decree will save plaintiff from the risk he is otherwise exposed to of losing evidence of his title, and will invalidate as against plaintiff the alienations made by the tenant for life. It is a case in which, therefore, although the decree is merely declaratory of the reversionary title, it carries with it a partial remedy, and the above objection cannot fairly be taken.

We, therefore, confirm the decree of the Principal Sadr Amín, and dismiss this special appeal with costs.

Appeal dismissed.

Appellate Jurisdiction (a)

Special Appeal No. 144 *of* 1865.

VANNERI PURUSHOTTAMAN NAMBUDRI..........*Appellant.*

PATANATTIL KUNJU MENAVAN.....................*Respondent.*

Where plaintiff's ancestors mortgaged land and the mortgagee obtained possession on condition that the produce should extinguish interest: *Held,* that the plaintiff's suit was not barred by the law of limitation, although the transaction took place 12 years before the passing of Regulation II of 1802.

Held also:—In such a case no cause of action could accrue until something was done to render the friendly possession hostile.

1865. *May* 1. *S. A. No.* 144 *of* 1865.

THIS was a special appeal from the decision of J. D'Silva, the Principal Sadr Amín of Calicut, in Regular Appeal No. 469 of 1863, reversing the decree of the Court of the District Munsif of Vittatnad in Original Suit No. 401 of 1861.

Karunákara Menavan, for the special appellant, the plaintiff.

G. E. Branson, for the special respondent, the 4th defendant.

The Court delivered the following

JUDGMENT:—In this case the plaintiff sued to recover land alleged to have been mortgaged for Rupees 125 in 1760, the produce to extinguish interest.

The only question raised by the parties was, whether the plaintiff or the 4th defendant was jenmi.

The Munsif decreed for plaintiff, and the Principal Sadr Amín reversed the decision upon the ground, which he supposed to be both nice and new, that the exception as to cases of mortgage does not apply to this case, because the cause of action had arisen more than 12 years before the passing of the Regulation II of 1802.

(a) Present: Frere and Holloway, JJ.

The fallacy of his reasoning arises from his supposing a cause of action, and of consequence the statute, to have begun to run at the date of mortgage. The possession of the mortgagee for 10,000 years upon such a transaction as the present would be perfectly consistent with the continuance of the relation of mortgagor and mortgagee, because the contract amounts simply to saying, "I lend the money and you the land. If either of us wants that which he has lent he shall restore that which was lent to him." It is quite obvious that no opportunity and necessity for interposing, that is no cause of action, accrued, until something was done to render the friendly possession hostile. This being so, the decree of the Principal Sadr Amín is clearly wrong, and it is reversed and the suit remitted for decision upon the merits.

1865. *May* 1. *S. A. No.* 144 *of* 1865.

Suit remitted.

Appellate Jurisdiction (a)

Special Appeal No. 47 *of* 1865.

NA'RA'YANAN CHETTY.......................*Appellant.*

MRS. JENSEN and another......................*Respondents.*

A married woman is capable of contracting in respect of her separate estate.

The doctrines of the Roman and English Law upon the subject examined.

THIS was a special appeal from the decision of R. G. Clarke, the Civil Judge of Tranquebar, in Regular Appeal No. 228 of 1863, confirming the decree of the District Munsif of Negapatam, in Original Suit No. 1,066 of 1861.

1865. *May* 1. *S. A. No.* 47 *of* 1865.

Ritchie, for the special appellant, the plaintiff.

G. E. Branson, for the special respondents, the defendants.

(a) Present; Holloway and Innes, JJ.

1865. May 1. S. A. No. 47 of 1865.

The Court delivered the following

JUDGMENT:—This suit was brought to recover Rupees 725-6-0, principal and interest due upon two mortgage instruments executed by first defendant, a married woman.

The first defendant did not answer, and the second, her husband, contended that, as the first defendant executed the documents without his knowledge, he was not liable, and they were invalid. He did not assert that the houses mortgaged were not his wife's separate property.

The Lower Courts held the transaction void by English law because there was not evidence of her husband's concurrence. The Civil Judge has not given any opinion upon the evidence as to the subsequent assent of the husband, nor has he taken the least notice of the allegation in appeal, that the mortgaged houses are the separate property of the first defendant, or of the further allegation that the English law is not applicable to the case.

The defendant, in his answer, has not asserted himself to be an Englishman. The Munsif urges that he is a European, and if so is probably of Dutch descent. In the absence, however, of any allegation to the contrary, it must be taken that his domicile is Negapatam. This, however, is a matter of little consequence, for, the contract affecting immoveables, the law applicable is the *lex loci rei sitæ.*

This is a point upon which nearly all the international jurists are accordant. The principle which, unlike Story who has had far too great influence in the English school, Savigny consistently applies [s. 386] is the voluntary submission of the parties. The law applicable to classes who have no special law is that of equity and good conscience. This has been clearly stated by the Judicial Committee in *Seth Sam* v. *Látchpaty Lálá (b)* in which the English law of equitable mortgage was applied, not because it was English law, but because in that particular consistent with equity and good conscience. Undoubtedly, it is most desirable that, for the purpose of discovering the rule of equity and good conscience, the tribunals should always be encouraged to inquire how systems of positive law have in analogous cases understood and applied the rule. Safely

(b) IX Moore's In. Appeals 303.

to apply this process, however, a Court must have a very thorough knowledge of the system from which the principle is to be eliminated, and must take pains to reject principles of accidental and mere arbitrary growth, and distinguish them from such as really flow from the nature of the subject matter. As we pointed out upon a recent occasion the application of English law requires a consideration of the conjoint operation of two sets of Courts: one set being employed, although not so extensively as formerly, in counteracting the other *(a)*.

The history of the liability of the wife's separate estate in equity has been well developed in the very recent cases of *Vaughan* v. *Vanderstegen (b)* and *Johnson* v. *Gallagher (c)*. The Courts in England have been gradually struggling to rid themselves entirely of the wretched doctrine of the Common law upon this subject. The Common law lawyers no doubt borrowed their views with their accustomed infelicity from the barbarous period of the Roman law. There are passages in the Roman law which declare the effect of marriage to be the merger of all the rights of property of the wife in the husband, but these applied to the form of marriage which rendered the wife a *filia familias*. That form was wholly obsolete in the golden age of Roman jurisprudence; then the title of the wife to her separate property was fully established *(d)*. As to all such property she was perfectly capable of contracting even with her husband himself. The very recent decision of the Lord Chancellor in *Taylor* v. *Meads (e)* is a remarkable instance of the rapid approximation of the English to the Roman doctrine.

The Lower Courts, therefore, are wholly mistaken in their views of English jurisprudence upon the subject. The Succession Act recently passed *(f)* declares that marriage shall have no effect whatever upon the relations of property. Equity and good conscience, therefore, lead us to the same result as positive law would now dictate.

(a) 2 H. C. Rep. 270.
(b) 2 Drew, 165.
(c) 30 L. I. Ch. 298.
(d) Muhl. Doctr. Pand. § 540; Mack, Sys. § 529.
(e) II Jurist, N. S. 166.
(f) Act X of 1865.

1865. May 1. S. A. No. 47 of 1865.

The Civil Judge will inquire whether "the houses mortgaged are the separate property of the first defendant."

It is accordingly hereby ordered that the Civil Judge do submit a finding on the foregoing issue, together with all the evidence on the point, within six weeks from the re-opening of his Court after the adjournment.

Issue directed.

Appellate Jurisdiction (a)

Special Appeal No. 134 *of* 1865.

D. BANGARAIYA ....*Appellant.*

D. BA'LABHADRA RA'ZU and others..............*Respondents.*

A plaintiff who has not a present right to possession cannot sue to eject.

Where plaintiffs, divided members of the family of defendant's husband, sued the defendant, a widow, for possession of property which she had received from her husband on the ground that she was improperly alienating it, *Held* that the Court could not grant the relief asked for.

1865. May 8. S. A. No. 134 of 1865.

THIS was a special appeal from the decision of S. Venkatádry, the Principal Sadr Amín of Rajahmundry, in Regular Appeal No. 182 of 1864, confirming the decree of the Court of the Additional District Munsif of Rajahmundry, in Original Suit No. 84 of 1864.

Sloan, for the special appellant, the 1st defendant.

The Court delivered the following

JUDGMENT:—In this suit plaintiffs, found to be divided members of the family of the principal defendant's husband, sued for possession of the property which she had taken from her husband, on the ground that she was improperly alienating it.

The Lower Courts decreed for the plaintiffs on the authority of a Section (162) of Mr. Strange's *Manual* not repeated in the new edition. For the doctrine therein contained, the learned author quotes no authority whatever.

(a) Present: Frere and Holloway, JJ.

On the simplest principles it is quite clear that this suit cannot be maintained. The only title of the plaintiffs is, if any, a title to the reversion after the life estate of the widow. Those, who purchase from her do so of course subject to all perils arising from the limited character of her estate, but it is elementary law that he who has not a present right to possession cannot sue to eject. The plaintiffs having no such right, the decrees of the Lower Courts are reversed, and the Original Suit dismissed with costs.

1865. *May* 8. *S. A. No.* 134 *of* 1865.

Appeal allowed.

Appellate Jurisdiction (a)

Referred Case No. 11 *of* 1865.

A'NDI KONAN *against* VENKATA SUBBAIYAN.

The plaintiff agreed with defendant that in consideration of the possession and use of certain land, and a third of the produce for the season, he would provide seed and labour and carry on the cultivation of the land. In a suit to recover the cultivator's share of the produce, *Held*, that the limitation was that prescribed by Clause 9, Sec. I, Act XIV of 1859.

THIS was a case referred for the opinion of the High Court by E. W. Bird, Civil Judge of Tanjore.

1865. *May* 15. *R. C. No.* 11 *of* 1865.

No Counsel were instructed.

The Court delivered the following

JUDGMENT:—This is a suit to recover *Parakudi-váram* or the cultivator's share of produce due to the plaintiff under an agreement for the cultivation of land belonging to the defendant in 1862-63. The question submitted for our decision is whether clause 2, or clause 9 of Section 1, Act XIV of 1859, applies to such an agreement.

The effect of the agreement come to between the parties we take to be this:—On the one hand the defendant in consideration that the plaintiff would find seed and labour and carry on the cultivation for a third of the produce, gave up to the plaintiff the possession and use of the land for the season. On the other hand the plaintiff, in con-

(a) Present: Scotland, C. J. and Innes, J.

1865. May 15. R. C. No. 11 of 1865.

sideration of the possession and use of the land being given him and of one-third of the produce, undertook to do all that was necessary for the cultivation and cropping of the land. By that agreement the parties were placed in a very different relationship from that of employer and labourer. For a time the plaintiff had an interest secured to him in the land, and the defendant's rights as owner were controlled by the mutual stipulations constituting the contract.

We think the period of limitation applicable to the case is that mentioned in clause 9 (*a*) of Section 1, namely, 3 years.

(*a*) Clause 9 is as follows:—

"To suits brought to recover money lent, or interest, or for the breach of any contract—the period of three years from the time when the debt became due or when the breach of contract in respect of which the suit is brought first took place, unless there is a written engagement to pay the money lent or interest or a contract in writing signed by the party to be bound thereby or by his duly authorised agent."

Appellate Jurisdiction (a)

Referred Case No. 12 *of* 1865.

BASTIAN *against* MAJOR J. G. S. TIREMAN.

An action was brought in a Small Cause Court against a Military Officer residing at M. at which the only other Military persons stationed were a Staff Officer and two Serjeants.

Held: that the Court had jurisdiction to try the case, the suit not being one exclusively cognizable by a Court of Requests under Section 103 of the Mutiny Act of 1864.

THIS was a case referred for the opinion of the High Court by James Wilkins, the Judge of the Court of Small Causes at Masulipatam.

1865. *May* 15. *R. C. No.* 12 *of* 1865.

No Counsel were instructed.

The Court delivered the following

JUDGMENT:—This was a suit for arrears of wages brought against a Commissioned Staff Officer of the Commissariat Department, and the question submitted for our decision is whether the defendant is amenable to the jurisdiction of the Court of Small Causes.

To make a suit exclusively cognizable by a Court of Requests composed of Military Officers under Section 103 of the Mutiny Act of 1864, (*b*) it must be against a person to whom the Act applied when the cause of action arose; and such person must be in a place where a body of Her Majes-

(*a*) Present: Scotland, C. J. and Innes, J.

(*b*) The Section is as follows:—

"In all places in India where any body of Her Majesty's Forces may be serving situate beyond the jurisdiction of any Courts of Requests, or other Courts for enforcing small demands, established at the cities of Calcutta, Madras, and Bombay respectively, actions of debt, and all personal actions against Officers or against persons licensed to act as Sutlers, or other persons amenable to the provisions of this Act not being soldiers, shall be cognizable before the Court of Requests composed of Military Officers, and not elsewhere, provided the value in question shall not exceed four hundred Rupees, and that the defendant was a person of the above description when the cause of action arose, which Court the Commanding Officer of any Camp, Garrison, or Cantonment is hereby authorized and empowered to convene;—and the said Court shall in all practicable cases consist of five Commissioned Officers, and in no instance of less than three, and the President thereof shall in all practicable cases be a Field Officer, and in no case be under the rank of a Captain, and every member shall have served five years as a Commissioned Officer."

1865. May 15. R. C. No. 12 of 1865.

ty's Forces is serving. Here the defendant no doubt was when the cause of action arose (as Section 2 shows) a person to whom the Act applied. But we are of opinion that he was not in a place where a body of forces was serving within the meaning of Section 103.

When all the provisions contained in that Section are looked at it becomes evident, we think, that the Legislature meant a place at which there is such a Military Force stationed on active service as can properly be said to form a Camp, Garrison, or Cantonment, and sufficient to furnish Officers of the rank and standing required to constitute the Court. A local military tribunal was clearly the object and purpose of the Section, and it is expressly provided that the Court is to be convened by the Commanding Officer "of any Camp, Garrison, or Cantonment;" and throughout the Section the Court's coercive powers are confined within the military limits of the Camp, Garrison, or Cantonment.

Here it appears that the only Military persons stationed at or near Masulipatam are a Staff Officer in charge of Pensioners and two Store Serjeants, and therefore the defendant was not, we are of opinion, for the above reasons, in a place where a body of Forces was serving within the meaning of Section 103. We are further of opinion that there is no ground for the objection that the debt arose or the defendant was in a place where it appears a Regiment was serving, which is 116 miles distant from Masulipatam,—and to which Regiment the defendant was not in any way attached. We answer the question submitted in the affirmative.

Appellate Jurisdiction (a)

Special Appeal No. 365 *of* 1864.

NA'RA'YANA CHODANGHI having died, his son CHANDRA CHODANGHI and others... .... } *Appellants.*

T. VENKATA KONDAL RA'O PANTULU having died, his sons and heirs TIMMAIYA and others .... } *Respondents.*

Plaintiff sued to recover certain lands attached to two villages of which he became proprietor in 1857. It was found that the defendants had been in possession for upwards of 50 years before the suit was brought.

Held, that the defendants' possession was hostile, and the suit was therefore barred by the statute of limitation.

1865. May 18. S. A. No. 365 of 1864.

THIS was a special appeal from the decision of E. B. Foord, the Acting Civil Judge of Chicacole, in Regular Appeal No. 60 of 1863, confirming the decree of the District Munsif of Tekkaly in Original Suit No. 93 of 1862.

Sloan, for the special appellants, the 3rd, 4th, 6th, 7th, 8th, 11th and 18th supplemental defendants.

The Court delivered the following

JUDGMENT :—Plaintiff is the proprietor of Bayannapéta and Bonsula Kottár villages, and in this suit seeks the recovery of 15 garces of land, 7 appertaining to the former and 8 to the latter village, which have been taken wrongful possession of by the landholders of the adjoining village of Parasurámpuram.

The defence set up was that the land claimed was situated within the boundaries of the village of Parasurámpuram ; that it had been in possession of the villagers of that village from time immemorial ; and that their title to it had been established by a decree in their favor by the late Pandit Sadr Amín, No. 127 of 1829.

The District Munsif and the Acting Civil Judge pronounced in plaintiff's favor.

The District Munsif was of opinion that, as ever since plaintiff had been in possession he had disputed defendant's right to the land, his remedy was not barred,

(a) Present : Frere and Innes, JJ.

1865. May 18. S. A. No. 365 of 1864.

and as the Government accounts showed that the lands lay within the boundaries of the villages for which plaintiff claims them, he decided in favor of plaintiff.

The Acting Civil Judge took the same view upon the latter point, but came to no decision on the question of whether the action was barred by the law of limitation, which was expressly raised in the appeal.

In the special appeal this point was again taken and we directed an issue upon it to the Civil Judge.

From his return it appears that the evidence shows that the land has been in possession of the defendants for the last 50 or 60 years. He gives it, however, as his opinion that the action was not barred, as there had been disputes as to the right of possession since 1857, when plaintiff entered upon possession of the estates of Bayannapéta and Bonsula Kottár.

To this finding objection was taken by Mr. Sloan, who appeared for the special appellants, and we think the objection is well founded. It is very clear and does not seem to be disputed that the lands have been in possession of the defendants for the last 50 or 60 years. Assuming that the lands are, as contended by plaintiff, within the boundaries of his villages, it is obvious that this possession by the defendants must have been a hostile possession as against the former proprietors in whose place plaintiff now stands. For they must, from the nature of the case, have been aware of the possession of the land by the defendants, and there is no pretence for saying that the possession by defendants was, during any portion of that long interval, merely permissive. Hostile possession, therefore, having been held of these lands by defendants, before the assumption of the estates of Bonsula Kottár and Bayannapéta by plaintiff, for a period more than sufficient to bar the remedy by action, this action by plaintiff will not lie.

We therefore reverse the decrees of the Lower Courts. Costs throughout will be discharged by plaintiff.

Appeal allowed.

Appellate Jurisdiction (a)

Special Appeal No. 173 *of* 1865.

BHAGAVATAMMA..*Appellant.*

PAMPANNA GAUD and others...........................*Respondents.*

A sale by a widow of property derived from her husband, who is divided in interest from his own family, is valid for her life. Such a sale will not be set aside at the instance of a divided brother of the husband.

THIS was a special appeal from the decision of R. Davidson, the Acting Civil Judge of Bellary, in Regular Appeal No. 166 of 1863, confirming the decree of the District Munsif of Bellary, in Original Suit No. 882 of 1862.

1865. May 18. S. A. No. 173 of 1865.

Rangaiya Náidu, for the special appellant, the first defendant.

Tirumalachériyar, for the special respondent, the second plaintiff.

The Court delivered the following

JUDGMENT:—This was a suit for the recovery of lands and houses said to have been recently sold by the first defendant, the widow of the divided brother of the plaintiff, to the second defendant.

The District Munsif passed judgment in favor of the plaintiff's claim, and this decision was affirmed in appeal by the Acting Civil Judge.

It has been already held by this Court in other cases that the sale of property in the circumstances stated in the plaint, that is to say a sale by a widow in a divided family, is good for the life-time of the widow, who possesses a life-interest in the lands and is clearly capable of alienating that interest at her discretion. We resolve, therefore, to modify the judgment of the Lower Courts to this extent. The parties will be charged with their own costs throughout the entire case.

Appeal allowed.

(a) Present: Frere and Innes, JJ.

Appellate Jurisdiction (a)

Special Appeal No. 424 *of* 1864.

MADAVA NA'IKAN..*Appellant.*

APPA'VU NA'IKAN *alias* SARAVAPPA NA'IKAN and others.. } *Respondents.*

Plaintiff sought to recover land sold by the 1st defendant, the widow of an undivided member of a Hindu family, and part of the consideration was the amount of a mortgage deed executed for the purpose of supplying the necessities of the husband of the 1st defendant. In special appeal a decree fastening the amount of the mortgage money upon the land was asked for. *Held,* that such a decree ought not to be made, the plaintiff not having sought for that relief, and the suit having been so conducted that the genuineness of the mortgage instrument, though disputed, was treated as a subordinate matter.

1865. *May* 27. *S. A. No.* 424 *of* 1864.

THIS was a special appeal from the decision of G. Ellis, the Civil Judge of Cuddalore, in Regular Appeal No. 77 of 1861, modifying the decree of the District Munsif's Court of Villapuram in Original Suit No. 127 of 1860.

Rájagopálachàry for the special appellant, the plaintiff.

The Court delivered the following

JUDGMENT :—In this case the plaintiff sued to recover land sold by the 1st defendant, the widow of one Náráyaná Náik, deceased.

The defendants, his brothers, alleged that the family was undivided, and that the 1st defendant had no authority to sell.

The original Court finally decreed the sum sued for and declared the property liable for the debt,

The Civil Judge considered that the Lower Court had erred in declaring the land security for the money, and decreed the money only, because plaintiff, as he supposed, had asked for either the land or the money.

Plaintiff appealed to this Court, and on an issue the Civil Judge finds that the family was undivided, but that the alleged mortgage was executed not for any family necessity, but on account of the necessities of the 1st defendant's husband alone.

(a) Present : Holloway and Innes, JJ.

1865. May 27. S. A. No. 424 of 1864.

This finding of course puts an end to all rights of the plaintiff under the deed of sale, since it is quit clear that the widow of an undivided member has no possible authority to sell family property. It has then been sought to obtain a decree fastening the amount of the mortgage money upon the land. We do not think that the plaintiff, who has for a long series of years, probably in collusion with the widow, been suing to obtain possession of property which that widow has been found to have no right to sell is entitled to any indulgence at the hands of the Court, and it would probably be sufficient to say that this is what the plaintiff has never asked.

Here, however, there would be positive injustice in making such a decree, for this alleged mortgage appearing in the suit solely as part of the consideration of the deed of sale, the genuineness of the mortgage document, although disputed, was necessarily a very subordinate matter, and was not considered at all by the Appellate Court.

This special appeal will therefore be dismissed with costs.

Appeal dismissed.

Appellate Jurisdiction (a)

Regular Appeal No. 12 *of* 1865.

PARANKUSAM NARASAYA PANTULU..........*Appellant.*

CAPTAIN R. A. C. STUART and another ..*Respondents.*

The retaining of a person in a particular place or the compelling him to go in a particular direction by force of an exterior will overpowering or suppressing in any way his own voluntary action is an imprisonment on the part of the person exercising that exterior will.

The refusing or accepting of bail is a judicial, not merely a ministerial, duty, and a mistake in the performance of that duty, without malice, will not be sufficient to sustain an action.

1865. *May* 27. *R. A. No.* 12 *of* 1865.

THIS was a Regular Appeal against the decree of the Civil Court of Chicacole in Original Suit No. 12 of 1864.

The Advocate General for the appellant, the plaintiff.

Brockman, for the 1st respondent, the defendant.

This suit was brought by plaintiff, at the time of the alleged wrong Sub-Magistrate of Aska, against the 1st defendant, a Superintendent of Police, for arresting him without a warrant, and against the 2nd, an Assistant Magistrate, for refusing to admit him to bail.

The 1st defendant alleged that there was no arrest, because the requirements of the Criminal Procedure Code had not been complied with.

The 2nd defendant admitted that he had committed an error but pleaded that he had acted in good faith and that the entry of the offence specified in Section 116 as not bailable in Mr. Mayne's edition and another edition of the Penal Code naturally misled him.

The facts of the case are not disputed. The plaintiff, accused of a certain offence for which he was not arrestable without warrant, received a letter from 1st defendant directing him to proceed to Rassulkonda to present himself before a Magistrate. Two Constables were directed to accompany him, as the defendant states, to prevent him from speaking to any one. They in fact accompanied plaintiff to the place,

(a) Present: Holloway and Innes, JJ.

to which their superior had directed him to go. The Magistrate also does not dispute that he left the accused in custody instead of bailing him. 1865. *May* 27. *R. A. No.* 12 *of* 1865.

On these facts the Civil Judge has dismissed the suit against the 2nd defendant, because he had acted in good faith, and against the 1st, because plaintiff has not suffered loss of caste or profession but only an injury to his feelings.

As to the action against the Magistrate, it cannot be sustained. It is no question of jurisdiction, or it would be necessary to consider the extent to which the doctrine in *Calder v Halket(a)* has been modified by Act XVIII of 1850. Mr. Baron Parke in that case suggested three possible constructions of the Act of Parliament, and decided that it protected Magistrates and Judges of inferior Courts from action for things done within their jurisdiction, but left them liable for things done wholly without jurisdiction. Then came the Act of 1850, which embodied Mr. Baron Parke's second possible construction of the old Act, and extended to Magistrates a protection, within limits which it is not now necessary to define, for acts done without jurisdiction. Here, however, the bailing or not bailing was a question for the Magistrate. He had jurisdiction over that question, and the only allegation against him is that he erroneously decided it. It is quite clear that as he is not alleged to have acted maliciously in this matter within his jurisdiction, no action lies against him. *Linford v. Fitzroy(b)* shows that the duty of the Magistrate in accepting or refusing bail is not merely a ministerial but a judicial duty. It also shows that a mistake in the exercise of that duty without malice will not sustain an action.

The case against the 1st defendant is a very different one, and it being conceded that, if the plaintiff was in custody, the custody was not lawful, the only questions are, whether 1st defendant imprisoned the plaintiff, and if so, what damages ought to be awarded. In this case it cannot be doubted, upon the facts, that the plaintiff was directed to go to Rassulkonda, and that the presence of the Constables, who followed or accompanied him, rendered it by

(a) III Moore's P. C. 28.
(b) 13 Q. B. 240.

1865. May 27. R. A. No. 12 of 1865.

no means a matter of option whether he would go or not. It is manifestly not necessary to constitute imprisonment that there should be a continuous application of superior physical force. In the felicitous language of Mr. Justice Coleridge, " it is one part of the definition of freedom to be able to go whithersoever one pleases, but imprisonment is something more than the mere loss of this power; it includes the notion of restraint within some limits defined by a will or power exterior to our own: "(*a*) Mr. Justice Williams in his judgment puts a case almost precisely similar to the present as an example of imprisonment. It is quite clear, therefore, from the full discussion which the subject received in that case, that the retaining of a person in a particular place or the compelling of him to go in a particular direction by force of an exterior will overpowering or suppressing in any way his own voluntary action, is an imprisonment on the part of him who exercises that exterior will. That the Superintendent of Police, by his letter, enforced as it was by the company of two Constables, put that stress upon the plaintiff's will, there exists no question.

As to the amount of damages, the sum demanded by the plaintiff is altogether extravagant. We think that we shall meet the justice of the case by awarding rupees 200 damages with proportionate costs to be paid by 1st defendant who will bear his own costs. Any costs incurred by the 2nd defendant must be paid by the plaintiff.

(*d*) Bird *v.* Jones VII Q. B. 742.

Appellate Jurisdiction (a)

Special Appeal No. 111 *of* 1865.

RAMAN AMMA'L .... *Appellant.*
SUBBAN ANNA'VI *alias* SUBRAMANIYAN ANNA'VI *Respondent.*

Plaintiff was entitled to a share of the estate of the defendant, a widow, in case the defendant should die without having exercised the right to adopt under the direction of her husband. Defendant having failed to adopt within a year plaintiff sued for his share. *Held,* that the plaintiff had no title to present possession, and that the suit must be dismissed. Sec. 162 of *Strange's Manual,* 1st Edition, dissented from.

1865. *June* 3. *S. A. No.* 111 *of* 1865.

THIS was a Special Appeal from the decision of J. H. Goldie, Civil Judge of Tinnevelly, in Regular Appeal No. 297 of 1864, confirming the decree of the Court of the Principal Sadr Amín of Tinnevelly in Original Suit No. 108 of 1863.

Srinivásachâriyâr, for the special appellant, the 2nd defendant.

Rájágopálachárlu, for the special respondent, the plaintiff.

The Court delivered the following

JUDGMENT:—This is a suit by plaintiff, a person alleged and apparently admitted to be entitled to a share of the estate of the principal defendant's deceased husband, should that defendant die without having exercised the right to adopt under the direction of her husband.

In a previous suit the same plaintiff had sued the defendant, and the former Principal Sadr Amín, following Section 162 of the first edition of Mr. Strange's *Manual* directed that if she did not adopt within a year, the estate should be made over to the next heirs.

In this case the adoption made has been declared invalid, because the adopted was the natural brother of the deceased husband.

The legality of this decision is not disputed, and it is unquestionable that the widow has not adopted within the period specified by the decree in No. 30 of 1859.

(a) Present: Holloway and Innes, JJ.

1865. June 3. S. A. No. 111 of 1865.

This being so, the lower Courts have felt themselves bound to give judgment for the plaintiff, no appeal having been preferred against that decree.

The only difficulty which we have felt is one of procedure, but we are of opinion that this suit, being a mere continuation of the proceedings in No. 30 of 1859, the Civil Judge was entitled to treat and bound to treat the decree in that suit as if also in appeal before him, and that we are equally entitled and equally bound to do so. For the section of Mr. Strange's book, no authority whatever is quoted, and the doctrine contained in it has been repeatedly overruled. The plaintiff has no title whatever to present possession, and it has been repeatedly decided that there is nothing whatever to prevent the widow from alienating her life estate. Even in case of waste the remedy is not an ejectment, and waste, whether legal or equitable, in a paddy field is scarcely conceivable. It being quite clear that the original decree of the Principal Sadr Amín was altogether illegal, and the whole proceedings in this cause being merely an effort to effectuate the improper declaration made in that decree, we entertain no doubt whatever that both that decree and the one now under appeal must be reversed.

The respondent will pay the appellant's costs in all the Courts in the present case.

Appeal allowed.

Appellate Jurisdiction (a)

Regular Appeal No. 24 *of* 1865.

SYED ALI SAIB.. *Appellant.*

SRI RA'JA SANIYA'SIRA'Z PEDDA BALAIYA'-RASIMHULU BAHA'DUR............................ *Respondent.*

To a suit upon a written instrument evidencing the loan of money, where there is no legal obligation to register the instrument, the period of limitation is six years.

THIS was a Regular Appeal from the decree of D. F. Carmichael, the Agent to the Government at Vizagapatam, in Original Suit No. 72 of 1864. 1865. June 3. R. A. No. 24 of 1865.

Sloan, for the appellant, the plaintiff.

Branson, for the respondent, the defendant.

The Court delivered the following

JUDGMENT:—In this case the Agent dismissed, as barred by Section 10 of the Limitation Act, a suit brought upon a written document evidencing the loan of money.

The period the Agent conceived to be three years.

Sections 9 and 10, as has been several times decided, are inapplicable. Section 9 applies to loans in which there is no written instrument. Section 10 to cases in which there is written evidence of the contract, such written evidence not being registerable by virtue of any law in force at the time of its creation. There was no law in force rendering registerable such insturments as the one in question. This being so, there is no special period of limitation prescribed, and the period is six years under Section 16.

The decision of the Agent is, therefore, reversed and the case remanded for decision.

Suit remanded.

(a) Present: Frere and Holloway, JJ.

Appellate Jurisdiction (a)

Special Appeal No. 81 *of* 1865.

P. BACHIRA'JU......................................*Appellant.*
V. VENKATAPPADU.................................*Respondent.*

According to Hindu law a mother inheriting from her son has not an absolute property in the estate, but merely a life interest, without power of alienation.

1865. *June* 8. *S. A. No.* 81 *of* 1865.

THIS was a special appeal from the decision of C. Collett, the Civil Judge of Vizagapatam, in Regular Appeal No. 316 of 1863, reversing the decree of the District Munsif of Vaddády in Original Suit No. 1453 of 1863.

Rájagopálachárlu, for the special appellant, the first defendant.

The Court delivered the following

JUDGMENT :—The facts of this case and the questions in issue in it have been so clearly set out by the Civil Judge that it is not necessary that we should recapitulate them.

The case comes before us now on special appeal mainly upon two grounds: first, that Kámama having entered upon the property in succession to her deceased son took it absolutely and with unfettered power of alienation; second, that there was no evidence of fraud in the transfer made by Kámama to defendant of the property which forms the subject of the claim.

The general doctrine in Hindu law in regard to the succession to property other than her peculiar property which has devolved on a woman is that those succeed her who would have been heirs in her default, or that her estate is an estate interposed for her life between that of the last absolute proprietor and his next heir. *Jimútaváhana* in Chapter XI, Section I, para. 56 says :—" But the wife must only enjoy her husband's estate after his demise. She is not entitled to make a gift, mortgage or sale of it. Thus, *Kátiyáyana* says, let the childless widow, preserving un-

(a) Present : Frere and Innes, JJ.

sullied the bed of her lord and abiding with her venerable protectors, enjoy with moderation the property until her death. *After her let the heirs take it.*" And in para. 65, "In like manner if the succession have devolved on a daughter, those persons who would have been heirs of her father's property in her default take the succession on her death, *not the heirs of the daughter's property.*" Also in Chapter XI, Section II, para. 30, after declaring that if a maiden daughter in whom the succession has vested and who was afterwards married die without issue, the estate does not go to her husband or other (her) heirs, since that rule of succession is applicable to a woman's peculiar property, he goes on to say—" since it has been shown by a text before cited (Section I, Act 56) that on the decease of the widow in whom the succession had vested, the legal heirs of the former owner, who would regularly inherit his property if there were no widow in whom the succession vested, namely the daughters and the rest, succeed to the wealth; therefore the same rule (concerning the succession of the former possessor's next heirs) is enforced *a fortiori* in the case of the daughter and the grandson whose pretensions are inferior to the wife's." Then in para. 31 he continues; "Or the word wife (in the text quoted Section I. para. 56) is employed with a general import: and it implies that the rule must be understood as applicable generally to the case of a woman's succession by inheritance."

1865. June 8. S. A. No. 81 of 1865.

The *Mitákshara,* however, the guide to the law of Southern India, enunciates the peculiar doctrine that property which devolves on a woman by inheritance is classed with stridhana; the effect of this doctrine being of course to give her absolute property in it and to change the line of descent.

In *Sir Thomas Strange's Hindu Law,* Edition of 1825, pages 165 and 166, he points to the distinction between the Bengal law and that of Southern India in this respect. Only part of this passage is to be found in *Mayne's* edition, page 144, where the practice of the Bengal School is stated, but the distinction taken by *Sir Thomas Strange* between it and the school of Southern India is (probably by accident) omitted. *Sir Thomas Strange* says "Had the pro-

1865. June 8. S. A. No. 81 of 1865.

perty been the mother's in the Hindu sense of woman's property it would descend on her death to her daughters, but having been inherited by her from her son, it passes, according to the law as practised in Bengal, not to her heirs but to his, which on failure of issue of the proprietor, male and female, of his widow and parents is his brother or brothers; those of the whole being preferred to those of the half-blood; those of the half succeeding only on failure or in default of those of the whole. According to the *Mitákshara*, which is followed in this respect by other authorities in Southern India, so vested it classes as stridhana and descends accordingly under the rules of inheritance for property of that description to her daughters and not to her sons; but according to the doctrine of the *Smriti Chandrica* the right of inheritance is vested in different persons, as it was acquired before or after coverture."

The passage in the *Mitákshara* to which reference is here made is as follows:—" That which was given by the father, by the mother, by the husband or by a brother; and that which was presented (to the bride) by the maternal uncles and the rest (as paternal uncles, maternal aunts, &c.) at the time of the wedding before the nuptial fire; and a gift on a second marriage, or gratuity on account of supersession, as will be subsequently explained, and *also property which she may have acquired by inheritance*, purchase, partition, seizure or finding, are denominated by *Manu* and the rest 'woman's property' (Chapter II, Section XI. para. 2)." A reference to the passage of *Manu* alluded to shows, however, that that source of all Hindu law has not specifically included property *inherited* among the classes into which he divides the stridhanam.

The passage runs thus:—" what was given before the nuptial fire, what was given on the bridal procession, what was given in token of love, and what was received from a brother, a mother or a father, are considered as the six-fold separate property of a married woman." Chapter IX, Sloka 194.

In para. 4, Section XI of Chapter II of the *Mitákshara*, it is explained that, when *Manu* speaks of the six-fold property of a woman, the intention is not to restrict the meaning to property of a denomination unquestionably falling within the

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six classes which he has enumerated, but is merely by way of declaring that there was no less than six kinds of such property, while there might be many more. And this view of the author is supported by the passage in *Manu* immediately following that just now quoted. It is as follows :—" What she received after marriage from the family of her husband, and what her affectionate lord may have given her, shall be inherited, even if she die in his life-time, by her children." (*Manu*, Chapter IX, 195) wherein are specified as her absolute property gifts from two sources, the former of which is much wider than any that is found in verse 194, while the latter is certainly not one of the six sources of property enumerated in that verse.

There is, however, no allusion in *Manu* to the doctrine of the *Mitákshara* that property devolving on a woman by inheritance is stridhanam, and while admitting therefore with the author of the *Mitákshara* and with *Jimúta Váhana*, Chapter IV, Section I, para. 18, that there is good warrant for saying that the term stridhanam is not limited in its meaning to property received by a woman from the particular sources specified, apparently by way of illustration, by *Manu* and others, and without denying that some inherited property (as that inherited from a mother) would be rightly classed as stridhanam, we do not see sufficient warrant in *Manu* for the opinion that all property inherited by a woman classes as such. And it is remarkable that while the *Mitákshara* in paras. 5, 6, and 7 of Section XI, Chapter II, enlarges upon the legal proposition laid down in para. 2 and quotes authorities in support of those parts of it which relate to gifts to a woman before or after marriage from her kindred and from her husband's family, no illustration whatever is given of the bare declaration that property acquired by inheritance also comes under the head of stridhanam. In the digest of *Jaganátha*, in the chapter on woman's property (Book V, Chapter IX) no allusion whatever is made to the doctrine, nor among the multitudes of other authorities quoted is this passage of the *Mitákshara* even so much as referred to.

The law as to the estate which a Hindu widow has in property devolving on her on the death of her husband without male issue has been long ago well settled and

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unless there were some more clear exposition of the law than the above passage from the *Mitákshara*, or the authority of decided cases showing that the estate held by a mother in property which has devolved on her from her son, whose wife has predeceased him and who has no issue, is larger and stands upon a different footing from that of the widow, we should hesitate to say that it was so. The cases in this Presidency in which this point has been directly decided must have been exceedingly rare, as none are to be found in the reports. We may refer however to the case of *Doe on d. of Rámasámi Mudaliár* v. *Vallata*, reported page 211, Vol. II of *Sir Thomas Strange's Notes of Cases decided in the Madras Supreme Court.* This case was decided in 1813 while *Sir Thomas Strange* was Chief Justice, and the point now in question was therein considered. In the judgment the following passage occurs :—" It seemed settled indeed that, the mother thus inheriting to her son, the inheritance would descend after her death to *his* and not to *her* peculiar heirs; and that she could not alien during her life to their prejudice." This was not the point directly in question in the suit and the *Digest* of *Jaghanátha* and not the *Mitákshara* is quoted in support of the opinion thus thrown out; but that the Chief Justice had the *Mitákshara* before him at the time and had access to the passage containing the opposite doctrine is evident from the Judgment itself and the foot notes to it in which the *Mitákshara* is several times quoted in support of other positions.

We think, therefore, that this is an indication of the opinion *Sir Thomas Strange* had arrived at as to what the practice of the law upon this point was in the Madras Presidency, and that his view was that, however authoritative the teaching of the *Mitákshara* and text-books of the same school might in general be, they were not to be followed in this particular point.

Among the cases quoted in *Morley's Digest* under the title " Inheritance," sub-title " Parents," not a single instance is given of the doctrine of the *Mitákshara* upon this point having been followed, though the question must frequently have been raised at Benares and other parts of India where what is called the Benares School prevails, the great authority of which is the *Mitákshara*. In the absence

therefore of any distinct authority in support of the doctrine of the *Mitákshara*, which, not having been illustrated or explained, leaves us in doubt whether the author attached as wide a meaning to the words "acquired by inheritance" as they naturally admit of, we think that the law upon this subject in the Madras Presidency follows the general rule of Hindu law; that property so devolved is not stridhanam, and does not follow the law of succession peculiar to property of that kind. It follows, then, that the mother inheriting to her son has not an absolute property in the estate, but takes merely for life and has no power of alienation.

1865. June 8. S. A. No. 81 of 1865.

We, therefore, affirm the Judgment below and dismiss the appeal with costs.

Appeal dismissed.

Appellate Jurisdiction (a)

Special Appeal No. 154 *of* 1865.

VADALI RA'MAKRISTNAMA..................*Appellant.*
MANDA APPAIYA and others..............*Respondents.*

Where a purchaser of immoveable property deals with a person having a qualified power of dealing with that property, it lies upon the purchaser to give some reasonable account of the need which actually existed, or was alleged to exist, for the sale.

THIS was a special appeal from the decision of C. Collett, the Civil Judge of Vizagapatam, in Regular Appeal No. 47 of 1864, confirming the decree of the District Munsif of Bimlipatam in Original Suit No. 26 of 1860.

1865. June 12. S. A. No. 154 of 1865.

Sloan, for the special appellant, the plaintiff.

The Court delivered the following

JUDGMENT:—This was a suit by a minor to recover his share of a parcel of land, alleged to have been mortgaged by his father for a debt which had been extinguished by the perception of profits by the mortgagee.

(a) Present: Holloway and Innes, JJ.

1865. June 12. S. A. No. 154 of 1865.

The defendants set up an additional mortgage and a sale by the mother, then guardian of her infant sons. The Lower Court considered the sale proved, and the Civil Judge upheld it in point of law because there appeared no ground for suspecting that the sale was other than a prudent one, the land having been heavily encumbered.

It seems to us that the principle which should govern this case is collectable from the judgment of the Lord Justice at page 423 of the report to which the learned Judge has referred (*a*). The party is here the original party to the transaction, dealing with one whom he knew or on proper inquiry might have known to have a qualified power of dealing, and it seems to us that it lay upon him to give some reasonable account of the need which actually existed, or which was alleged to have existed, for this sale of the minor's property. The necessity certainly is not apparent upon the facts of the case, for the debt of the father was upon the land, and its produce was paying that debt. We do not however wish to lay down any rigid rule as to the burden of proof: we will merely say that it originally lay upon the purchaser.

Without therefore attempting to fetter in any way the discretion of the Lower Court in determining the question, we refer for decision the issue:—

Issue:—Was the sale by the guardian of the minor's property made for such a family necessity as justified the guardian with her limited authority in making it?

It is accordingly hereby ordered that the finding of the Civil Court upon the foregoing issue be submitted to this Court within six weeks from the date on which it re-opens after the adjournment.

Issue directed.

(*a*) 6 Moor. In. Ap. 393.

Appellate Jurisdiction (a)

Special Appeal No. 257 *of* 1864.

RA'MASAMY AIYAN..........................*Appellant.*

MINA'KSHI AMM'AL and another.........*Respondents.*

There is no rule of Hindu law which recognizes any authority in a widow entitled only to maintenance to make contracts for necessary supplies binding upon the heir in possession of the family property and liable to maintain her.

1865. *June* 12. *S. A. No.* 257 *of* 1864.

THIS was a special appeal from the decision of E. W. Bird, the Civil Judge of Tanjore, in Regular Appeals Nos. 31 and 48 of 1863, confirming the decree of the Court of the Principal Sadr Amín of Tanjore in Original Suit No. 2 of 1862.

Ritchie and *Rájagopálachárlu,* for the special appellant, the plaintiff.

Srínivásachári yár, for the second special respondent, the second defendant.

The Court delivered the following

JUDGMENT:—This is a suit upon a bond executed in 1855 by the first defendant alone, for money previously advanced to her from time to time for her necessary maintenance whilst living separate and apart from her deceased husband's family; and it is sought to make the second defendant liable for the principal sum and interest, on the ground that she is in the enjoyment of property left by her deceased husband who was the adopted son of the first defendant and her husband and in his lifetime chargeable with the first defendant's maintenance during the period that the advances were made by the plaintiff.

The liability of the first defendant is undisputed; and as regards the second defendant there is no doubt that her husband succeeded to the family property belonging to his adoptive father, the first defendant's husband, and that she at the death of her husband became and continued to be possessed of such property. But it appears that, in 1860, the first defendant brought a suit in the Civil Court of Tanjore (Original Suit No. 3 of 1860) against the second defendant

(a) Present: Scotland, C. J. and Innes, J.

1865. June 12. S. A. No. 257 of 1864.

to recover maintenance from the year 1849, and obtained a decree in her favor, but only for maintenance from the date of the suit: the Civil Court deciding that payment of maintenance for the past time could not legally be enforced. That decree was in accordance with the decisions of the late Sadr Court (since overruled, *see Special Appeal No.* 433 *of* 1863, 2 *High Court Reports*, 36,) and was not appealed against.

Both the Lower Courts have held the first defendant alone liable upon the bond and dismissed the suit as against the second defendant. Against that decision the plaintiff has appealed, and the question we are called upon to decide is whether, notwithstanding the decree in the former suit, the plaintiff can legally or equitably make the second defendant liable for the debt incurred by the first defendant. And for the purpose of deciding this question we must assume (and we do no more) that the advances for which the boud was given were made for, and were not in excess of, the first defendant's reasonable maintenance for the time.

Now, clearly as a matter of contract there is no liability on the part of the second defendant, nor was there on the part of her husband. The first defendant had full capacity to contract and she alone executed the bond; and granting that the plaintiff made the advances under the *bonâ fide* belief that as widow the first defendant had a continuing right to maintenance out of the estate in the hands of her adopted son and his widow, the second defendant, we think there is no principle or rule of Hindu law which recognizes any authority in a widow, entitled only to maintenance, to make contracts for necessary supplies binding upon the heir in possession of the family property and liable to maintain her.

We have been referred to several texts and the commentary thereon in *Colebrooke's Digest*, Book I, Chapter 5, relating to the liability of heirs to pay the proper debts of the person from whom they inherit property, and to the payment of debts contracted for necessary family expenses whilst the family are living together, and during the prolonged absence of the head of the family. But those passages have no application to the present question. The heir no doubt takes the property subject

to liability to the just claims of creditors as well as to those who have charges upon it; and in the case of necessaries supplied to a family the liability rests on the ground that one member acts as the agent of all and binds all. The second defendant's husband and the second defendant herself were undoubtedly liable to the first defendant for her maintenance, but, upon the decision adverse to the first defendant's claim in the former suit, the second defendant ceased to be liable in respect of the time during which the plaintiff's advances were made. Here the whole question is whether in law the relation of debtor and creditor was created as between the second defendant or her husband and the plaintiff, and for that no authority has been or can, we think, be shown; and to hold so would lead to results seriously opposed to the principle of dependence and control which underlies the law governing the relationships of a Hindu family. We are, therefore, of opinion, that the second defendant is not liable to the plaintiff's claim in this suit.

1865. June 12. S. A. No. 257 of 1864.

If this had been a case in which payment of a suitable amount of maintenance could have been enforced by the first defendant for the time during which she incurred the debt in question the plaintiff might, upon equitable grounds, have claimed to be considered in the position of an assignee of the first defendant and to stand in her place to the extent of the amount ascertained to have been advanced for necessary maintenance, and to have payment of that amount decreed to him as against the first defendant out of the arrears of maintenance found to be due from the second defendant. But, as already observed, all liability of the second defendant to the first defendant for maintenance before the commencement of the former suit in 1860 was got rid of by the decree in that suit, and therefore no amount of maintenance remains due out of which the plaintiff could equitably, as against the first defendant, be declared entitled to payment of his debt by the second defendant.

For these reasons our Judgment is that the decree of the Civil Court be affirmed and the respondent's (second defendant) costs of the appeal paid by the appellant.

Appeal dismissed.

Appellate Jurisdiction (a)

Special Appeal No. 133 *of* 1865.

RA'MANA'DAMISARAIYAR........................Appellant.
RA'MABHATTAR..............................Respondent.

Oral evidence of the discharge of an obligation executed by writing is admissible.

1865. *June* 15. *S. A. No.* 133 *of* 1865.

THIS was a special appeal from the decision of G. A. Harris, the Civil Judge of Coimbatore, in Regular Appeals Nos. 169 and 170 of 1863, modifying the decree of the Court of the Principal Sadr Amín of Coimbatore in Original Suit No. 1 of 1861.

The Advocate General, for the special appellant, the defendant.

Tirumalachâriyâr, for the special respondent, the plaintiff.

The Court delivered the following

JUDGMENT:—The suit was brought to recover a sum of money; several documents constituted the evidence of the defendant's indebtedness.

So far as it enters into the present appeal, the defence was that the money was paid.

The Civil Judge discredited the genuineness of a letter (No. 2) adduced as evidence that the obligation was partially discharged. His conclusion upon that point is not subject to scrutiny in special appeal. We may, however, incidentally remark that, if the inconclusiveness of a comparison of signatures is given as a reason for not comparing the signature to the disputed document with an undisputed signature of the plaintiff upon the record, the Civil Judge was in error. Such comparison was always permissible, and the Evidence Act has extended the old doctrine. After discrediting the written evidence of payment the Judge says:—

"The defendant possesses no other written acknowledgment of the bonds A and B having been discharged, and

(a) Present: Holloway and Innes, JJ.

I refuse to admit the oral evidence which he has brought forward on the point; it has been repeatedly ruled that such is not legal evidence."

The Civil Judge is quite correct in saying that it was repeatedly held by the late Sadr Court that oral evidence of the discharge of an obligation executed by writing was not admissible. The first decision of the kind professed to be founded upon an opinion of the pundits that this was the Hindu law. It is manifest that even if this was the case it could be no ground for adopting the rule, for we have never professed to follow the adjective law of the Hindus. It would, however, probably have been found that the answer given by the pundits really arose from the fact that the rules of the Hindu law of evidence are mainly concerned with the weight to be given to particular sorts of evidence. It will be found that there is not in the Hindu law a trace of the distinction between the admissibility and the credibility of evidence. Whatever, however, the origin of this doctrine, it has been overruled in many cases during the last three years. There never of course existed in the English law of evidence the slightest foundation for it. Of course if a receipt is given the contents of that receipt cannot, unless the non-production of the document is accounted for, be proved by oral evidence, but even where a receipt has been given, there is nothing to prevent the fact of payment like any other fact being proved by oral evidence. So uniform has been the law that, as the text writers show, only one case, and that a nisi prius one, exists directly upon the point.

In these circumstances it is necessary to remit the case to the Civil Judge for judgment upon the issue.

Issue:—Does the oral evidence of the defendant establish the payment pleaded by him?

It is accordingly hereby ordered that the Civil Judge do submit his finding upon the foregoing issue within six weeks from this date.

Issue directed.

Appellate Jurisdiction (a)

Regular Appeal No. 29 *of* 1865.

VELLAI MIRA' RAVUTTAN and another......*Appellants.*
MIRA' MOIDIN RAVUTTAN and others........*Respondents.*

Regular Appeal No. 30 *of* 1865.

VELLAI MIRA' RAVUTTAN........................*Appellant.*
VARISAI MIRA' RAVUTTAN and others......*Respondents.*

Additions made to the joint estate by the managing member of a Mahomedan family will be presumed, in the absence of proof, to have been made from the joint estate, and will be for the benefit of all the members of the family entitled to share.

1865. *June* 21. *R. A. No.* 29 *of* 1865 *and R. A. No.* 30 *of* 1865.

THESE were regular appeals against the decrees of the Civil Court of Tinnevelly in Original Suits Nos. 6 and 4 of 1862.

Busteed and *Karanákará Menavan*, for the appellant, the 1st defendant.

Rájagopálachárlu, for the respondents, the plaintiffs.

The Court delivered the following

JUDGMENT :—The original suits which have led to the two appeals now under consideration were instituted separately by different members of a family of the Labbay caste in the Tinnevelly District for the recovery of their share of the joint family property. In No. 29 the plaintiffs claimed as the representatives of their deceased father Muhammad Ravuttan; and in No. 30 the plaintiffs sued for a share of the property which had devolved upon the common ancestor of the parties, Muhammad Nainár Ravuttan. The 1st defendant is the same in both suits, being the managing member of the family; and the 1st and 2nd plaintiffs in No. 29 are 5th and 6th defendants in No. 30.

The Civil Judge awarded to the plaintiffs in both cases their share of the property, calculated in accordance with the rules of Mahomedan law. Against these decisions the 1st defendant has appealed in both cases.

The two chief points on which the counsel for the only real appellant, the 1st defendant, has insisted in these

(a) Present : Frere and Innes, JJ.

1865. June 21. R. A. No. 29 of 1865 and R. A. No. 30 of 1865.

Appeals are; 1st, that the case of the parties is different from that of a family governed by the rules of Hindu law, and that therefore the presumption applicable to a Hindu family residing in a state of union, that acquisitions made by any member of the family form part of the joint estate, cannot be adopted in a case of this kind. We are unable to see the force of this argument; for although the technical rules of Hindu law are not applicable to families of this tribe, the same presumption must arise from facts of a similar kind and the same principle must be equally held to govern cases of family partnership among Hindus and Mahomedans. The 1st defendant, having been managing member of the joint estate for a long series of years, must be presumed to have made these additions to the property from the joint estate, unless the contrary were shown, which he has been unable to do in the present instance.

The second point which has been urged upon us is that the 1st defendant has been improperly made to account to the plaintiffs in No. 30 for their share in the sum of Rupees 20,281 forming a portion of the family property. This cash balance the 1st defendant alleges to be in the possession of the 4th to 7th defendants in that case, and it is argued therefore that these defendants, and especially the 5th, should be charged with the payment to the plaintiffs of that part of this sum which forms the plaintiffs' portion. We are of opinion, however, that this property is clearly traced to the 1st defendant; and that the Counsel for the appellant, notwithstanding the ability and industry displayed in his argument, has failed to meet the reasons assigned by the Civil Judge, in para. 22 of his judgment in the case No. 30, for discrediting the assertion of the 1st defendant that the above 5th and other defendants subsequently took posessssion of this portion of the family property.

There are other points in the two cases to which allusion has been made by the Counsel for the appellant, but it has not been attempted to press them seriously upon us. It is sufficient to say that on these points also we see no reason whatever to question the justice of the original decision.

1865. June 21. R. A. No. 29 of 1865 and R. A. No. 30 of 1865.

We cannot conclude our remarks without observing that the labour of the Court, involved in the consideration of these appeals, has been much facilitated by the clear and satisfactory manner in which the Civil Judge has stated, and commented upon, the several questions at issue in these two suits. We have felt ourselves much indebted also, as has been already intimated, to the Counsel for the appellant for the lucid and well-arranged argument in which he has set the case of his client before us. We confirm the original decision of the Civil Judge in both these cases and dismiss the two appeals with costs.

Appeals dismissed.

Appellate Jurisdiction (a)

Special Appeal No. 188 *of* 1865.

PALANIVELAPPA KAUNDAN..................*Appellant.*
MANNA'RU NA'IKAN and another..............*Respondents.*

A sale by a father is valid by Hindu Law to the extent of his own share of the undivided estate. There is no distinction according to the Madras School between a father and other co-parceners.

1865. June 22. S. A. No 188 of 1865.

THIS was a special appeal against the decree of the Additional Principal Sadr Amín's Court of Coimbatore in Regular Appeal No. 244 of 1863, reversing the decree of the District Munsif's Court of Bhaváni in Original Suit No. 57 of 1863.

Tirumalachári yár, for the special appellant.

Srinivásachári yár, for the special respondents.

The Court delivered the following

JUDGMENT:—In this case the plaintiff has most improperly been allowed by the Munsif, whose irregularity has not been noticed by the Principal Sadr Amín, to sue for what he calls the cancellation of an agreement made by his father. The real truth of the matter is that the 2nd defendant, the father of plaintiff, has sold land alleged to be family property to 1st defendant, and that, as is now admitted, the land has actually been delivered in pursuance of the

(a) Present: Frere and Holloway, JJ.

sale. It is manifest that the cancellation of the rázinámá would be of no use whatever to the plaintiff, and that he ought to have been compelled to sue for what he really wanted.

In argument, treating this case as an action for the recovery of the land, it has been contended that a sale by the father is altogether void, that partition for the purpose of satisfying his contracts cannot as in other cases be directed. The principle upon which, following the suggestion of Sir T. Strange and Mr. Colebrooke, the Courts have of late years satisfied the contract of one individual member out of the share which would come to him on partition, is that as the co-parcener has contracted he ought to fulfil his contract, that he could, if disposed at any time, according to the doctrine of the Madras School, enforce a partition, and that it is only just that, where he has incurred an obligation, he shall not be allowed to escape its effects by the allegation that his own deed was *ultra vires*, but compelled to give to his creditor all the remedies to which he would himself be entitled as against the object matter of his agreement. It is quite clear that on the theory of the Madras School there is no distinction between a father and other co-parceners.

We therefore refer to the Lower Court the issue:—To what portion of the land sued for would the 2nd defendant be entitled on a partition enforced by suit?

It is accordingly hereby ordered that the Principal Sadr Amín do return his finding on the foregoing issue within six weeks from this date.

Issue directed.

Appellate Jurisdiction (a)

Civil Petition No. 151 *of* 1865.

VENKATA'CHELLA CHETTI and another...*Petitioners.*
PARVATAMMA'L..................................*Counter-Petitioner.*

No appeal lies from an order of a Judge proceeding under Act XIX of 1841. The fact that the Judge may have rejected evidence which ought to have been received and considered does not warrant the High Court in interfering to set aside an order of such Judge.

1865. *June* 29. *C. P. No.* 151 *of* 1865.

THIS was a petition against an order of R. G. Clarke, the Civil Judge of Tranquebar, dated 29th April 1865.

The Advocate General, for the petitioners.

Miller, for the counter-petitioner.

JUDGMENT:—This is an application to set aside for want of jurisdiction an order made by the Civil Judge of Tranquebar under Act XIX of 1841, from which under Section XVIII of that Act no appeal is allowed.

The petitioner Parvatammál, daughter of the deceased Náráyanaswámy Chetti, affirms that the property in dispute, consisting of a house and garden and the personal property in the house, was the property of her deceased father, and that the counter-petitioners, Venkatáchella Chetti and another, who are now appellants before the High Court, have no title, being the illegitimate sons of the deceased. The above counter-petitioners on the contrary urge that they are in possession under a deed of gift from their father, and that they were born in lawful marriage.

The Civil Judge decided in favour of the daughter, Parvatammál, and directed that she should be put in possession.

Whether in this case the Civil Judge has decided on sufficient inquiry or whether his decision is correct in point of fact, or even of law, is not the question. No appeal lies against the order, and even if it were admitted for argument's sake that, in the absence of jurisdiction, the High Court has power to interfere, we cannot hold that

(a) Present: Frere and Innes, JJ.

1865. June 29. C. P. No. 151 of 1865.

the Civil Judge had no jurisdiction in the case. The application was in its nature one which under the Act the Civil Judge was clearly competent to entertain. But it was argued by Mr. Advocate General on behalf of the sons that it was evident from the registered deed of gift under which possession was taken by them many years ago, that this was not a case of possession taken upon succession which it should be to bring it under the Act, as the Judge would have seen had he not improperly rejected that document. This, however, would depend upon the genuineness of the document, which is not admitted by the other side, and all that the argument amounts to is that the Judge has improperly rejected evidence, the truth of which, whatever its bearing may be, may yet be successfully contested. The refusal of the Judge to admit this important evidence and give it consideration, however unaccountable it may appear, having been a proceeding in a question rightly before him, he clearly did not act without jurisdiction.

Upon the question which was raised by the other side as to whether this Court has the power to set aside for want of jurisdiction an order of a Court subordinate to it, when that order has been made by it in the exercise of its original jurisdiction to which the provisions of Section 35, Act XXIII of 1861 would not be applicable, it is not at present necessary to give any opinion.

It is accordingly ordered that this application be, and the same hereby is, dismissed.

Petition dismissed.

Appellate Jurisdiction (a)

Special Appeal No. 279 *of* 1865.

NALLANA GAUNDAN......*Special Appellant (Plaintiff.)*
and
PALANI GAUNDAN...*Special Respondent (Defendant.)*

A mortgagor stipulated by an instrument in writing that if he failed to repay the sum lent on mortgage within three years the property mortgaged was to be held on absolute sale. *Held*, that the mortgagor was entitled to redeem although the amount lent had not been repaid within the three years.

1865. *July* 10. *S. A. No.* 279 *of* 1865.

THIS was a Special Appeal against the decree of the Civil Court of Coimbatore in Regular Appeal No. 18 of 1865, reversing the decree of the Court of the District Munsif of Karúr in revised Original Suit No. 297 of 1863.

Brockman, for the special appellant, the plaintiff.

G. E. Branson, for the special respondent, the defendant.

The Court delivered the following

JUDGMENT:—The only question involved in this appeal is, whether plaintiff, who passed to defendant land under a document in the following words, is entitled to redeem.

" Having received sale receipt for the decree amount due to Nallathamby Chetty and Kutti Chetty of Ponnankuly Pálayam attached to Ukanura village in Pulladam taluk, I have this day obtained from you Rupees 82, the amount due to the said plaintiffs, and paid the same to them. As I have mortgaged to you $2\frac{2}{16}$, $\frac{3}{64}$ ballahs of punja and $\frac{3}{16}$, $\frac{1}{16}$, $\frac{1}{32}$ ballah of garden land No. 677 called " Amayadnakádu" with a well and a " Tolay" situated thereon, and $2\frac{3}{16}$, $\frac{1}{64}$ ballahs of punja land No. 681 "Chinna Amayadyanakádu," the puttah of which runs in my name, and have received the said decree amount of Rupees 82, I will not only put in a rázinámá for the transfer of puttah in your name, but also in the "Calavathy" of Chithri of the year Ananda next (April and May 1854) I will pay to you the said sum of Rupees 82 and will have a rázinámá presented

(a) Present: Frere and Holloway, JJ.

for the re-transfer of the puttah in my name. If I were to fail to do so by the said term, the said lands with the well and Tolay thereon are to be held on absolute sale for the said sum of Rupees 82 by you and your generation. No sooner the said rázinámá is presented in the taluk, I will buy a stamp and have this bond executed on it. You are also to execute to me a counter-deed on stamped paper regarding the said term of 3 years. Thus this karár has been executed."

The Civil Judge has quoted a decision of the late Sadr Court and held the plaintiff barred by acquiescence in the holding of the land by defendant as absolute owner since 1854. It is unnecessary to consider the question of the supposed acquiescence, because the point really is whether the defendant has ever become a vendee or whether he is still a mortgagee. If there has never been absolute ownership there can have been no acquiescence in its exercise.

Upon questions of mortgage, the late Sadr Court has followed to its fullest extent the doctrine of the English Courts of Equity that, where an absolute conveyance or assignment of an estate is originally intended as a security for money, the conveyance will ever afterwards in Equity be considered as a mortgage and redeemable on the usual terms, and that a contemporaneous agreement clogging that right of redemption will be altogether void. (Sp: vol. II. 618.)

It is equally clear that even if the conveyance is in the form of a sale and the mortgagor has bound himself that on some future event, as on failure of payment on a particular day, it should operate as a purchase, the mortgagor will be entitled to redeem if the original intention was to mortgage. (*Spurgeon* v. *Collier*, I. Eden. 59 and the note p. 60). This doctrine has been upheld in numerous recent cases, although the transaction has been held to be a sale(*a*). This doctrine too the late Sadr Court has repeatedly professed to follow. Now the present case is much weaker for the defendant than the one put; the document evidencing the contract recites a mortgage and merely imports an agreement that it shall be converted into a sale in case of non-

(*a*) Williams *v*. Owen, 5 Mylne and Craig 303; Alderson *v*. White, 2 DeG. and J. 97.

1865. July 10. S. A. No. 279 of 1865.

payment within three years. Such a condition is *a fortiori* void. It is unnecessary here to advert to the difficulties which beset a mortgagee seeking to enforce an agreement for the purchase of the equity of redemption. (Webb v. Bourke II. Sch. and Lef. 673).

In a recent case in this Court, in which the document executed might have evidenced a conditional sale, the Lower Court held that the condition for re-purchase with a stipulation for an absolute sale in case of failure to pay at the time was a penalty which could not be enforced. We of course could not agree with this doctrine and referred to the Lower Court the issue whether the parties intended a mortgage or a sale, because it is of course quite competent to parties to sell with a condition for re-purchse at a particular time; then, in case of non-payment at the time, there is no equity to relieve against the sale. It is the intention of the parties which governs, and that intention may be shown by the deed itself, by other instruments, or even by oral evidence. (Alderson v. White, II. DeG. and J. 97.) In the present case the intention is abundantly clear upon the document itself. The conduct of the case by the parties renders it one simply of construction.

The decree of the Lower Court must be reversed, and the plaintiff declared entitled to redeem on payment of the money secured by the document I. The plaintiff having set up a usufructuary mortgage which he failed to prove, each party will bear his own costs both in the Court below and in this appeal.

Appeal allowed.

Appellate Jurisdiction (a)

Special Appeal No. 311 *of* 1865.

AVUL KHA'DAR and three others ....*Appellants.*
ANDHU SE'T ....*Respondents.*

A consent by a Vakil of the party to a decree being made binding property other than what the parties to the suit may have an interest in is a consent to what is beyond the scope of the suit and could be neither binding on the party nor acted upon by the Court.

Where a suit was brought against the defendant as the representative of a person deceased and the Courts below found that the amount was due but that the defendants had not taken possession of any property of the deceased person. *Held,* that the Lower Courts should have determined the further question whether the defendants were the legal representatives of deceased and entitled to his estate.

1865. *July* 15. *S. A. No.* 311 *of* 1865.

THIS was a special appeal against the decree of the Principal Sadr Amín's Court of Coimbatore in Regular Appeal No. 84 of 1864, modifying the decree of the Court of the District Munsif of Coimbatore in Original Suit No. 881 of 1863.

O'Sullivan, for the special appellants, defendants one to four.

Miller, for the respondent, the plaintiff.

The Court delivered the following

JUDGMENT:—In this suit plaintiff sought to recover from defendants Rupees 530-9-5, amount due to plaintiff by Fakiri Ravuttan, the deceased husband of the 5th defendant and brother of defendants 1, 2, 3 and 4.

The claim was made against the defendants as the representatives of the deceased. The 3rd and 5th defendants allowed the suit to be tried *ex parte* as against them. The 1st, 2nd and 4th defendants in defence denied the debt and said that Fakiri Ravuttan had for the last six years lived separately and that his property had not been inherited by them. In other words they said (1) that there was no such debt due as that claimed, (2) that they were not the representatives of Fakiri Ravuttan and (3) that they had not taken assets.

(a) Present: Frere and Innes, JJ.

1865. July 15. S. A. No. 311 of 1865.

The issues recorded by the Munsif were of a very general character and were to the following effect:—

1. Whether deceased owed the amount;

2. If so, whether defendants could be made liable for it.

He found on the first issue for plaintiff. On the second issue he found for defendants, as there was no credible evidence of their having possessed themselves of the estate of deceased, and dismissed the suit.

On appeal by plaintiff the Principal Sadr Amín held that the only point at issue was, whether the defendants had taken possession of the estate of Fakiri Ravuttan. He concurred with the Munsif in finding that they had not. But as the plaintiff's vakil said that the deceased Fakiri Ravuttan had been entitled to a share in a house left by his deceased father and requested that this property might be held liable for the debt due to plaintiff, and as defendants' vakil said that the defendants did not object to such share (if it existed) being so held liable, the Principal Sadr Amín passed a decree exempting defendants from all personal liability and declaring plaintiff entitled to collect the amount from the property, if any, of the deceased Fakiri Ravuttan or from any share to which Fakiri Ravuttan had a title under law in the estate left by his deceased father.

Defendants now prefer this special appeal on the ground that as the defendants' liability, personal or otherwise, was not established, the suit ought to have been dismissed.

It was argued by Mr. Miller, who appeared for the plaintiff, that the assent given by defendants' vakil to the course proposed by plaintiff's vakil precluded defendants from taking this objection; while on the other hand it was contended by Mr. O'Sullivan that the consent given was no admission of liability in the suit, and that defendants have nevertheless been wrongly made liable under it.

It is necessary therefore to see what this assent

amounted to. The action had been brought to recover a certain amount due from the estate of the deceased in respect of which these appellants were liable as his representatives, and by the defence of 1st, 2nd and 4th defendants the issue whether they were or were not his representatives was clearly raised, though no such issue was in terms recorded; and as respected the other defendants who were *ex parte* the same issue (having regard to the nature of the suit) should have been recorded by the Munsif. The Courts below, however, appear to have confined themselves to determining the question of whether defendants had possessed themselves of deceased's estate. But this was not sufficient. For although it should appear, as the Courts found, that defendants did not take possession of any part of the estate, still if they were found to be representatives of the deceased they would rightly be made answerable for the debt out of any such property of the deceased as in their capacity of representatives they might be found entitled to.

Now in the present case the Principal Sadr Amín found that defendants had not possession of the estate and did not find that they had any title to it as the representatives of the deceased; and on this finding they could not be held liable to answer the claim, because it amounted to saying that they were not properly parties to the suit. The suit however was not dismissed as against them, and the decree, although absolving them of all personal liability, makes them liable in respect of any property which may be found to have formed part of deceased's estate or to which he was entitled ; for the decree cannot be against the property alone, there must be some parties through whom the property is made liable, and it is clear that these defendants must be the parties so affected by the decree. Now as far as the finding on the issues goes, it would appear clear that the Principal Sadr Amín must have satisfied himself that if any such property existed as that referred to by plaintiff's vakil, these defendants were not in possession of it and were not entitled to it, and that the persons in possession of it and entitled to it, if any, were not before the Court. Their consent therefore by their vakil amounted

1865. July 15. S. A. No. 311 of 1865.

to saying, we are not found to be representatives of deceased and we are found not to possess his estate, and we do not of course object to any order you may think fit to make against any property in which we are not interested, since such orders cannot of course be made to affect us.

A consent by the vakil of a party to a decree being made in it binding property other than what the parties to the suit may have an interest in is clearly a consent to what is beyond the scope of the suit, and such a consent could neither be binding on the party (Swinfen *v.* Lord Chelmsford, 5 H. and N. 890) nor be acted upon by the Court. It was however acted upon by the Principal Sadr Amín and in a manner evidently not contemplated by the vakil, for it made the defendants liable in respect of the property to which his consent referred, whereas his consent, as explained above, could only have intended that the defendants should not be affected by the order to be made.

We think therefore that the consent given by the defendants' vakil does not preclude defendants from preferring this appeal.

Then in regard to the point taken in appeal, we think as intimated above that the main question upon which the liability or non-liability of defendants depends, viz. their status as representatives of the deceased, has not been clearly determined, and that as this issue was raised by the nature of the suit as it affected 3rd and 5th defendants who were *ex parte* and by the express line of defence taken by 1st, 2nd and 4th defendants, an issue upon the point ought to have been recorded by the Munsif. Had this been done and had it been found that defendants were the legal representatives of the deceased, although as yet they are not in possession of his estate, there would then apparently have been nothing objectionable in the decree of the Principal Sadr Amín. And as defendants cannot justly be made liable under the decree nor in justice to the plaintiff absolved from liability without the determination of that upon which their liability mainly depends, we resolve to send the following issue for determination by the Principal Sadr Amín.

Issue:—Whether any of the defendants are legal representatives of the deceased and entitled to his estate, and if so, which of them are so entitled. 1865. *July* 15. *S. A. No.* 311 *of* 1865.

It is accordingly ordered that the finding of the Principal Sadr Amín on the foregoing issue be submitted to this Court together with the evidence within three months from this date.

Issue directed.

Appellate Jurisdiction (a)

Referred Case No. 13 *of* 1865.

C. A. A. VERNEDE *against* ABDUL GIRI CHINNA SWA'MI.

The imprisonment of a defendant by order of the Magistrate under Act XIII of 1859 does not preclude the plaintiff from proceeding by Civil Suit for recovery of money advanced to the defendant for the performance of work.

THIS was a case referred for the opinion of the High Court by G. R. Sharpe, the Judge of the Court of Small Causes at Tellicherry. 1865. *July* 17. *R. C. No.* 13 *of* 1865.

No counsel were instructed.

The Court delivered the following

JUDGMENT:—In this suit the plaintiff sought to recover money advanced to 2nd defendant for the performance of work.

The defendant answered that the matter had already been brought before a Magistrate under Act XIII of 1859, (for the punishment of breaches of contract by artificers, workmen and laborers in certain cases) and that, on his declaring his inability to repay the money according to the Magistrate's order, he had suffered imprisonment.

The Judge of the Small Cause Court gave judgment for the plaintiff subject to our decision on the question "whether the order of the Magistrate for the re-payment of the money has been so satisfied by the subsequent impri-

(a) Present: Scotland, C. J. and Frere, J.

1865. July 17. R. C. No. 13 of 1865.

sonment of the 2nd defendant as to deprive plaintiff of his remedy by action.

We are of opinion that the decision of the Judge is right. The Act was passed for the purpose of punishing fraudulent breaches of contract, and imprisonment under Section 2 is the punishment provided for non-compliance with the Magistrate's order, directing either re-payment of the money advanced, or performance of the contract. In the former case the Magistrate's order, we think, remains unsatisfied within the meaning of the proviso, if the money has not been repaid at the end of the term of imprisonment.

Appellate Jurisdiction (a)

Special Appeal No. 148 *of* 1865.

RA'JAN..*Appellant.*
BASUVA CHETTI and two others...............*Respondents.*

Plaintiff, a member of an undivided Hindu family, sued to recover a parcel of land which he alleged his uncle 1st defendant to have wrongly transferred to the 2nd defendant. The 2nd defendant alleged a sale to him by the 1st defendant and a subsequent sale to the 3rd defendant, and that the plaintiff had no title. The District Munsif gave judgment for the plaintiff. Upon appeal the Principal Sadr Amin, finding that the plaintiff knew of the sale, and treating the knowledge as evidence of acquiescence in the original contracting, reversed the decision of the Munsif. *Held*, (reversing the decision of the Principal Sadr Amin) that mere knowledge would not make the plaintiff a party to the sale by the 1st defendant so as to bar his right to recover the land for which he sued in ejectment.

A person who seeks to bar one who is *primâ facie* the legal owner by evidence of ratification or of facts cogent enough to prove one not a formal to be a substantial party must make and prove such a case, for he is one who seeks to displace a legal title.

1865. July 24. S. A. No. 148 of 1865.

THIS was a special appeal against the decree of the Court of the Principal Sadr Amín of Coimbatore in Regular Appeal No. 220 of 1863, reversing the decree of the Court of the District Munsif of Coimbatore in Original Suit No. 226 of 1863.

This special appeal coming on for final hearing, the Judgment of the Court was delivered by

HOLLOWAY, J.—This suit was brought by plaintiff on behalf of himself and an infant to recover ⅔rds of a certain

(a) Present:—Holloway and Innes, JJ.

parcel of land which he alleged his uncle, the 1st defendant, wrongfully to have transferred to the 2nd defendant. Plaintiff further alleged that they had been wrongfully excluded from all benefit of this family property.

The 1st defendant admitted that the land was family property, and alleged that 2nd defendant held under a mortgage.

The 2nd alleged a sale to himself by 1st defendant and a subsequent sale to 3rd. His case was that the family had been divided for 25 years, and that the plaintiff had no title whatever.

The 3rd and 4th defendants appear to have united in this case, for the Munsif in a finding unchallenged has found that there was really no sale to 3rd. His opinion obviously was that the asserted sale was a mere fraud of these relatives to embarrass the assertion of plaintiff's claim.

The Munsif decreed for the plaintiff, finding the family undivided, and the Principal Sadr Amin, quoting a decision of the Chief Justice at I H. C. Rep. 131, dismissed the suit, considering that the fact of silence for 11 years proved that the plaintiff had acquiesced and was a party to the sale. At the first hearing of the case I understood the counsel for the respondent to be arguing a case of mere passive acquiescence, and I observed incidentally that the doctrine had been overruled by the Chief Justice himself as well as by other Judges. I had in view the remark of the Chief Justice at II H. C. Rep. p. 116.

I must at the same time admit that the frequent quotation of this case in support of the doctrine as to the efficacy of mere passivity had led me to the belief that there was something in the case in support of that view. When examined, however, it is a positive authority for the position that the failure of a Judge of the lower Court to take into account evidence which is material is such a miscarriage as to justify the interference of the Court in special appeal. Incidentally there is an observation that silence with other circumstances may prove a man not formally a party to a contract really a party. It is needless to say that

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I perfectly concur with both these positions. As to the second of them, no Civil lawyer or English Equity lawyer has ever doubted it, although much conflict of opinion has existed in England as to the weight of such evidence.

I saw the return to the issue for the first time on the Bench, and was still under the impression that passive acquiescence was the bar, and in my oral judgment I dealt solely with the question of knowledge and its efficacy as a matter of law.

On proceeding to write the judgment, as in this side of the Court we are compelled to do where we differ from the decision of the Court below, I found to my astonishment that the Principal Sadr Amín had not intended to use this delay as matter of law but as evidence of knowledge, and that knowledge as evidence of acquiescence in the original contracting. The oral judgment therefore would have led those who did not examine the case to the opinion that my learned colleague and myself were denying that a man who does not join in a contract at the moment at which it is made and who does not formally execute it cannot in any circumstances be held to have contracted and that no evidence can be conceived strong enough to establish such a contract.

It is not surprising that this misapprehension arose, because it could never have been conceived that the Principal Sadr Amín would have decided against the plaintiff upon a case not only not made by the defendants but expressly repudiated by them. Their case is not, he contracted with us, but he never contracted with us and need not have contracted with us because he is neither owner nor part owner, he has no title whatever. The only issue in the cause then was whether the plaintiffs had a good legal title, for if so, they must recover in this simple action of ejectment.

I am almost ashamed, although it is evidently no work of supererogation, to point out that a contractor who seeks to bar one primâ facie the legal owner by evidence of ratification, or of facts cogent enough to prove one not a formal to be a substantial party, must make and prove

such a case, for he is one who seeks to displace a legal title. This seems as plain a rule of common sense as it unquestionably is of equitable pleading. To show the gross absurdity of any other doctrine we will imagine the defendants seeking relief in a Court of Equity by injunction against the plaintiff in the ejectment at law, and alleging in his bill that the plaintiff at law has no title at law; it is needless to say that such a bill would be a complete absurdity. In the cases, and they are not very numerous, in which specific performance of a contract against one not formally a party has been sought, the whole case of acquiescence is made upon the pleadings (*Bigg* v. *Strong* III. DeG. and Sm. 592). I have said enough to show that the Principal Sadr Amin has deviated from the very simplest principles of procedure in seeking to apply to such a case as this the doctrine of conclusive evidence of consent to a prior contract.

The only case, therefore, which was really open to the Principal Sadr Amin was the bare delay, and this is mere evidence of knowledge, and whether sufficient to prove that it is unnecessary to say, because mere knowledge would in itself be nothing.

This is the only point that was dealt with in the oral judgment as it was the only point open, and the opinion there expressed is fully borne out by the greatest authorities, both Roman and English.

Speaking of the contract of sale, Donellus says, "Ut puta vendidit aliquis me sciente fundum meum neque tamen consentiente nulla a me contracta venditio est. Si tamen pretium accipiam ex causâ placet videri me fundum vendidisse." The great Civilian here says, "If one sells my farm, I knowing of it and not consenting, I have entered into no contract of sale, but if I on account of that transaction accept the price, it is the correct decision that it should appear that I have sold the farm." There can in fact be no question, after recent decisions, that this is also the law of England. Lord Cranworth in a recent case points out the absurdity of concluding that a man assented to a contract because when he was never asked he never expressed assent

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or dissent; and the judgment of Lord Wensleydale (in *Ridgway v. Wharton* vi. H. L.) shows how that very learned Judge dealt with mere knowledge on the part of the principal.

It is elementary law that to the validity of a private transaction by which rights are constituted preserved or lost, will and the expression of will are both necessary. As to evidence of express declarations of will, it is unnecessary here to say anything, for in this case there is no pretence of such, but it is of some consequence to see the nature of the case from which a valid though tacit determination of will may be inferred. Quoting again the illustrious Civilian Donelles, " Re quoque, id est facto aliquo, convenire potes et obligatio contrahi, id ita fit cum ex re et facto aliquo antecedente voluntas colligitur, atque id tum accidit *cum fieri non potuit quod factum est nisi prius conventio precedens placeret.*"* It is possible also to agree and for an obligation to be contracted *re*, that is by something done, and this takes place when what has been done could not have been done unless a previous contract had first been approved. This shows clearly the nature of the proof to be demanded. The conduct of the party whose liability is sought to be established must be such as would be inexplicable except upon the hypothesis of the existence of the contract which it is sought to establish. Mackeldey too, one of the great Jurists of Germany known to us only by his excellent elementary book, thus defines a tacit expression of will:— " Tracita quæ tunc exstat si quis ejusmodi aliquid agit quod sanæ rationi convenienter nullam aliam atque eam admittit interpretationem paciscentem negotio consentire voluisse." (Mack. Sys. § 163) I take these statements of two illustrious Civilians, delivered at an interval of several conturies, correctly to represent the law of England also as to acquiescence in this particular application of the doctrine which has not been much considered in the English Courts. To this particular application my present observations are entirely confined.

Bigg v. *Strong* (III DeG and Sm. 392) is a case of the setting up of a contract or, which is the same thing, decid-

* Don, Com. Lib. XII Cap. 10 § 18.

ing that a man not formally was really a party to it. In that case the evidence was of the strongest character. There was a contract by the son, assuming to act as agent of the father, and surrendering to the plaintiff their joint interest in a parcel of land. Proof was given of general agency of the son for the father, positive proof of knowledge of the contract by the father 5 days after its execution, and the father, by not being pressed for the rent due, really accepted the benefit of the contract, the excusing of that rent for which plaintiff was pressing being the consideration for the sale. Moreover, the father and son were perhaps co-trustees. Yet in binding the father the Vice-Chancellor said "that he arrived at this result with a full sense of the difficulty of the question." He seemed also to apprehend that some conflict would be found between his decision and that of the House of Lords in *Ridgway* v. *Wharton*, of which he had not an authorised report. It seems to me that this case has precisely the qualifications stated by the Civilians to establish tacit assent.

Ridgway v. *Wharton* was a case in which there was unquestionably strong evidence of acquiescence both before and after the acts of the agent, yet the majority of the law lords held that there was no concluded contract, because no tacit appointment or recognition of the agent.

It is useful to view these cases decided in England. I must remark that certainly no looser rule ought to be adopted in this country. As such looser rule would be more dangerous here, so there is less excuse for it. The state of a Hindu family as to the number and relationship of its members can be with the utmost readiness ascertained by any man who makes reasonable inquiry such as every contractor is bound to do and every honest contractor does do.

It is in strictness quite unnecessary here to say whether, if the case on the pleadings had been made, I should have considered that there was any evidence of such a case. Some remarks were made upon this matter during the argument, and I repeat what I there said, that evidence when used with reference to a cause does not mean something upon which a fanciful mind may by conjecture base some

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inference, but matter which in a properly constituted mind is calculated to raise and ought to raise an inference in favor of the affirmative or negative of the matter in dispute. If a fact in itself, and this is the case with most isolated facts, has a double aspect, is equally explicable on the hypothesis of an affirmative or a negative, then I should say that the fact standing alone is no evidence. Here there is the delay and the residence with the 1st defendant and nothing more. This is equally consistent with the hypothesis that the plaintiff did not know, that he knew and did not approve, that he knew and approved. It is obviously also equally consistent with the hypothesis that the uncle, without the knowledge of the nephew, sold for the joint advantage of the family, and with that of the more common case that one member of the family, has sold in its entirety for his own private benfit or gratification that which belongs to him only in part. Standing alone, therefore, I consider such a fact no evidence of the affirmative of the issue which would have been on the defendant.

It by no means follows, because a fact is in a chain of evidence a link necessary to its continuity, that the link standing alone is any evidence in the judicial sense of the term of the inference which the whole chain would inclusively establish. The daily practice of the English Courts illustrates this proposition. Its bearing upon the law of special appeal will of course be of infrequent occurrence, but it is clear that it may so bear. This law simply prevents our interfering with the decisions of the Lower Courts because we may consider that the balance of the evidence has been wrongly struck or because we think that the evidence does not raise an inference upon which the Lower Court ought to have acted. The inadequacy of proof is not a question of law, its utter absence is.

There is no doubt that the decree of the Principal Sadr Amin in this case must be reversed and with costs. My colleague concurs with every substantial proposition in this judgment, and I believe does not dissent from anything in its form for which however I am alone responsible.

Appeal allowed.

Appellate Jurisdiction (a)

Regular Appeal No. 41 *of* 1865.

NA'RA'YANA AIYAN and 6 others............*Appellants.*

SRI'NIVA'SA AIYAN..............................*Respondent.*

A suit for mesne profits alleged to be due upon land between the institution of a former suit and the execution of the decree cannot be maintained.

THIS was a Regular Appeal from the decree of T. I. P. Harris, the Civil Judge of Trichinopoly, in Original Suit No. 10 of 1861. 1865. *August* 1. *R. A. No.* 41 *of* 1865.

Rangáchāriyár, for the appellants, the 1st, 4th, 5th, 6th, 7th, 8th, and 15th defendants.

Rájagopáláchárlu, for the respondent, the plaintiff.

The Court delivered the following

JUDGMENT:—This is a suit for mesne profits alleged to be due upon land between the institution of the suit and the execution of the decree.

Mesne profits were claimed in the original suit and were therefore part of the subject matter of the suit.

It is clear therefore that by Section 11, Act XXIII of 1861 (*b*), this action cannot be maintained. The decree of the Court below must therefore be reversed, but it will be reversed without costs, because the defendants never took this point but set up defences altogether frivolous.

Decree reversed.

(*a*) Present: Frere and Holloway, J J.

(*b*) Section 11 says:—"All questions regarding the amount of any mesne profits which by the terms of the decree may have been reserved for adjustment in the execution of the decree, or of any mesne profits or interest which may be payable in respect of the subject matter of a suit between the date of the institution of the suit and execution of the decree, as well as questions relating to sums alleged to have been paid in discharge or satisfaction of the decree or the like and any other questions arising between the parties to the suit in which the decree was passed and relating to the execution of the decree, shall be determined by order of the Court executing the decree, and not by separate suit, and the order passed by the Court shall be open to appeal. Provided that if upon a perusal of the petition of appeal and of the order against which the appeal is made, the Court shall see no reason to alter the order, it may reject the appeal, and it shall not be necessary in such case to issue a notice to the respondent before the order of rejection is passed."

Appellate Jurisdiction (a)

Regular Appeal No. 34 *of* 1865.

KRISTNA AIYANGA'R..................... ....*Appellant.*

PERUMA'L NA'DA'N and 12 others..................*Respondents.*

Where the Lower Court rejected a plaint on the ground of an improper joinder of causes of action and also that the suit was not sufficiently valued, and the High Court were of opinion that there has been no improper joinder of causes of action, the order of the Lower Court was reversed, and the Civil Judge directed to deal with the case in accordance with Section 31, Act VIII of 1859.

1865. *August* 5. *R. A. No.* 34 *of* 1865.

THIS was a Regular Appeal from the decree of T. I. P. Harris, the Civil Judge of Trichinopoly, in Original Suit No. 30 of 1864.

Srínivásachariyar, for the appellant, the plaintiff.

Miller, for the respondents, the defendants.

The Court made the following

Order :—In this case the Civil Judge rejected the plaint presented by the appellant upon two grounds, because it included different causes of action, and because the suit had been undervalued. We are of opinion that there was no improper joinder of causes of action. The subordinate statements of various actions must be regarded as merely ancillary to the main prayer for relief. The order of the Civil Judge is therefore wrong so far as that ground is concerned, and the case then becomes that of a plaint dismissed for insufficiency of valuation.

As the plaintiff does not appear to have had an opportunity of correcting the improper valuation, the proper course will be to reverse the Civil Judge's order and to direct him to proceed strictly in accordance with Section 31 of the Code of Civil Procedure (*b*.)

(*a*) Present : Holloway and Innes, J J.

(*b*) Section 31.—" If it appear to the Court that the claim is im-" properly valued or being properly valued that the plaint is written " upon stamped paper of inadequate value, and the plaintiff on being " required by the Court to correct such improper valuation or to supply " such additional stamp as may be necessary, shall not comply with " the requisition, the Court shall reject the plaint."

It is accordingly ordered that the order of the Civil Court, dated 20th of January 1865 be, and the same hereby is, reversed, and the Civil Court directed to deal with the case strictly in accordance with the Section above quoted. 1865. August 5. R. A. No. 34 of 1865.

Appeal Allowed.

Appellate Jurisdiction (a)

Special Appeal No. 90 *of* 1865.

RANGAIYAN AND 3 others......... *Special Appellants.*

HARI KRISHNA AIYAN......... *Special Respondent.*

In a suit for the recovery of land situated within the territories of the Rajah of Pudukotta. *Held* that the Civil Court of Trichinopoly had no jurisdiction.

THIS was a Special Appeal from the decision of T. I. P. Harris, the Civil Judge of Trichinopoly, in Regular Appeal No. 141 of 1863, reversing the decree of the Court of the District Munsif of Konâd in Original Suit No. 363 of 1861. 1865. August 7. S. A. No. 90 of 1865.

Rájagopálacharlu for the 2nd and *Srinivasachariyar* for the 1st, 3rd, and 4th special appellants, the 1st, 5th, 7th, and 8th defendants.

Tirumalachariyar, for the special respondent, the plaintiff.

The Court delivered the following

JUDGMENT:—This was a suit for the recovery of real property, and the only question with which it is now necessary to deal is that of jurisdiction.

The return of the Civil Judge shows that the property is situated within the territories of the Rajah of Pudukotta and clearly not within the territorial jurisdiction of the Court at Trichinopoly. The filing of decrees of the Court of Pudukotta brought this fact still more prominently before the Court.

(a) Present: Frere and Holloway, J. J.

1865. August 7. S. A. No. 90 of 1865.

Section V of the Civil Procedure Code distinctly declares jurisdiction over real property to depend upon the place of situation of such property being within the jurisdiction of the Court. The vakil for the special respondent was of course compelled to admit that this property is not so situated with respect to the Court at Trichinopoly. It being manifest that the Courts below have acted wholly without jurisdiction, the decree of the Civil Judge is reversed and the original suit dismissed with all costs original and appeal.

Appeal Allowed.

Appellate Jurisdiction (a)

Criminal Petition No. 99 *of* 1865.

A'NDY CHETTY.......................*Prisoner.*

The prisoner asked a witness to suppress certain facts in giving his evidence against the prisoner before the Deputy Magistrate on a charge of defamation. *Held* that this was abetment of giving false evidence in a stage of a judicial proceeding and was triable before a Court of Session only.

1865. August 12. C. P. No. 99 of 1865.

THIS was a petition against the sentence of G. Ellis, Session Judge of Cuddalore, in Case No. 129 of the Calendar for 1865.

Miller, for the prisoner.

JUDGMENT :—The prisoner was charged before the Deputy Magistrate with having abetted the making a false statement on oath before a public servant and thereby committed an offence under Section 181 of the Indian Penal Code. This conviction was confirmed on appeal by the Session Judge. Appeal is made to us on the ground, that the conviction is illegal, the offence not being one which would properly fall under Sections 181 and 116.

The prisoner asked the first witness to suppress mention of certain facts in giving his evidence against him before the Deputy Magistrate, in reference to a charge of defamation, and this constitutes abetment of giving false evidence in a stage of a judicial proceeding, which is expressly excepted from the jurisdiction of all Courts but the Courts of Session.

(a) Present : Frere and Innes, J. J.

Section 181 would appear to apply to cases in which the proceedings were not of a judicial character, such as proceedings before a Commissioner of Income Tax. 1865. *August* 12. C. P. No. 99 *of* 1865.

The case being one which involved an offence triable by the Session Court alone, the Deputy Magistrate had no jurisdiction, and we shall therefore quash the sentence.

It is accordingly ordered that the sentence of the Deputy Magistrate be, and the same hereby is, cancelled.

Appellate Jurisdiction (a)

Referred Case No. 14 *of* 1865.

ABOO SAIT AND CO. *against* ARNOTT.

ABOO SAIT AND CO. *against* DALE.

A Court of Small Causes has no jurisdiction to try an action brought against a Military Officer in a Military Cantonment where a Court of Requests is established.

It is beyond the power of the local Legislative Council to pass an Act in any way affecting the provisions of a statute of the Imperial Parliament.

THIS was a case referred for the opinion of the High Court by Lieutenant Colonel F. Young, the Judge of the Court of Small Causes at Wellington. 1865. *October* 23. R. C. No. 14 *of* 1865.

No Counsel were instructed.

The Court delivered the following

JUDGMENT:—In both these actions the defendant is an Officer in the Military Cantonment of Wellington. The question is whether the Small Cause Court has jurisdiction.

From the enactments in Sections 8 and 36 of Madras Act IV of 1865, it certainly seems to have been the intention of the local Legislature to do away with the jurisdiction of Courts of Requests in every Military Cantonment in which a Court of Small Causes was established under the Act. But we are clearly of opinion that the Act can have no such operation. Exclusive jurisdiction is given to Military Courts of Request by the Statute 27 Vict. Cap, 3

(a) Present: Scotland, C. J. and Holloway, J.

1865. October 23. R. C. No. 14 of 1865.

Section 103, and it is beyond the power of the local Legislative Council to pass an Act in any way affecting the provisions of a statute of the Imperial Parliament, as is plainly declared in Section 42 of 24 and 25 Vict. Cap 67, the statute constituting the Council. Our answer therefore in both the cases submitted is that the Judge of the Court of Small Causes at Wellington had no jurisdiction.

Appellate Jurisdiction (a)

Referred Case No. 16 *of* 1865.

NARASIDAVUR *against* MARANA KAUNDAN.

Where plaintiff sued for a portion of grain in the nature of net rent which had fallen due, that amount being within its jurisdiction although the whole amount payable from first to last under the agreement would be in excess of its jurisdiction. *Held,* that the suit was cognizable by a Court of Small Causes.

1865. October 23. R. C. No. 16 of 1865.

THIS was a case referred for the opinion of the High Court by T. V. Ponnuswàmy Pillai, the District Munsif of Cheyur, in the Zillah of Coimbatore, in Suit No. 71 of 1865.

No Counsel were instructed.

The Court delivered the following

JUDGMENT:—The question submitted is whether the Small Cause Court can entertain a suit for a portion of grain in the nature of net rent which has fallen due, that amount being within its jurisdiction, although the whole amount payable from first to last under the agreement would be in excess of that jurisdiction.

We see no reason whatever for doubting that the Court has jurisdiction. The suit is practically one for rent, and we can see no ground for saying that under the Small Cause Court Act a suit for rent, which has fallen due upon a lease, cannot be entertained, because the rent payable for the whole period of that lease would be from its amount beyond the Court's jurisdiction.

(a) Present: Scotland, C. J. and Holloway, J.

Appellate Jurisdiction (a)

Special Appeal No. 186 *of* 1865.

PALANIYANDI KAUNDAN............ ......*Appellant.*

MUTTUSA'MI KAUNDAN and another......*Respondents.*

In a suit for the recovery of land upon an alleged lease found to be not genuine, the defendant set up a sale by plaintiff's father. The Lower Court found that there had been a sale in fact, but held it to be invalid according to Hindu Law as having been without the concurrence of the plaintiff, the son of the vendor. *Held*, that the decree was erroneous, the validity of the sale not having been questioned by the plaintiff who had rested his case on entirely different grounds and no issues having been raised as to the validity of the sale.

1865. *October* 24. *S. A. No.* 186 *of* 1865.

THIS was a special appeal from the decision of C. Lakshmaiya, the Acting Principal Sadr Amin of Salem, in Regular Appeal No. 212 confirming the decree of the Court of the District Munsif of Námkal in Original Suit No. 428 of 1863.

Tirumalachâriyár, for the special appellant, the defendant.

Rangachâriyár, for the special respondents, the plaintiffs.

The Court delivered the following

JUDGMENT:—This was an action for the recovery of land said to have been leased to the defendant some years prior to the institution of the suit.

The defendant pleaded that the land had been sold to him by Kongaya Kaundan, the father of the plaintiff, in the year 1856.

The Principal Sadr Amin discredited the alleged lease, and considered the sale to the defendant to be proved in point of fact, but declared the plaintiff to be entitled to possession, on the ground that the sale was invalid by Hindu law, as having been made without the concurrence of the plaintiff, the son of the vendor.

(a) Present: Frere and Innes, J. J.

1865. October 24. S. A. No. 186 of 1865.

The invalidity of the sale for the reasons stated by the Principal Sadr Amin was a point not put forward by the plaintiff himself, who rested his claim on grounds altogether different. It is very possible that the legal point, if it had been urged by the plaintiff, would have raised issues, the decision of which might have materially affected the result of the suit, and we are therefore of opinion that the judgment of the Principal Sadr Amin is erroneous.

We accordingly reverse his decision, and dismiss the claim of the plaintiff with all costs.

Appeal allowed.

Appellate Jurisdiction (a)

Special Appeal No. 399 *of* 1865.

KA'LIAPPA KAUNDAN..............................*Appellant.*

VAYAPURI KAUNDAN and another.........*Respondents.*

Where defendants infringed plaintiff's legal right and the Lower Court dismissed the suit with costs on the ground that plaintiff had given no evidence that he had sustained substantial damage. *Held,* that the plaintiff was eutitled at least to a decree without damages and costs.

1865. October 28. S. A. No. 399 of 1865.

THIS was a special appeal from the decision of T. Kristnaswámi Aiyar, the Principal Sadr Amin of Coimbatore, in Regular Appeal No. 83 of 1864, reversing the decree of the Court of the District Munsif of Udamalapetta in Original Suit No. 44 of 1863.

Srinivásachâriyár, for the special appellant, the plaintiff.

Miller, for the special respondents, the 1st and 2nd defendants.

The Court delivered the following

JUDGMENT:—In this case the finding of the Lower Court was, that the defendants had infringed the plaintiff's legal right. Even therefore though the plaintiff failed to prove the substantial damages alleged, of which very slight evidence ought to have sufficed, where the defendants with

(a) Present: Frere and Holloway, J. J.

full knowledge produced no counter-evidence, the plaintiff was still entitled at least to a decree without costs and damages and ought certainly not to have been made to pay defendants' costs.

1865. *October* 28. *S. A. No.* 399 *of* 1865.

In modification of the decree of the Court below, we therefore decree that the plaintiff's rights have been infringed by defendants, but that his suit is, so far as it seeks substantial damages, dismissed but without costs, and that there be no costs of this appeal.

Appeal allowed.

Appellate Jurisdiction (a)

Civil Petition No. 124 *of* 1865.

AMMIAPPA MUDALI .... *Petitioner.*

MOULAVI MAHOMED MUSTAFA SAIB, Acting District Munsif of Madura .... *Counter-Petitioner.*

Wilful abuse of his authority by a Judge, that is wilfully acting beyond his jurisdiction, is a good cause of action by the party who is thereby injured.

THIS was a petition against an order of J. D. Goldingham, the Acting Civil Judge of Madura, dated the 27th February 1865.

1865. *November* 4. *C.P. No.* 124 *of* 1865.

Order:—Petitioner had instituted a suit in the Civil Court against the Acting District Munsif of Madura. The suit was for damages on account of injury sustained by petitioner in consequence of the acts of the Munsif in wilful abuse of his authority.

The Acting Civil Judge dismissed the suit without calling upon the defendant to answer, and petitioner now appeals from the order of dismissal. From the order it appears that the petitioner had appealed to a former Acting Civil Judge against the acts of the Munsif, and that the Judge had given them his approval; and that the Acting Civil Judge was therefore of opinion that no action could possibly lie.

(a) Present: Frere and Innes, J. J.

1865. November 4. C.P. No. 124 of 1865.

Wilful abuse of his authority by a Judge, by which we understand his wilfully acting beyond his jurisdiction, is a good cause for an action by the party who is thereby injured. The approval of the late Acting Civil Judge amounted to nothing more than that he saw nothing in the conduct of the District Munsif, his subordinate, calling for departmental notice.

This, however, cannot interfere with petitioner's right of action. As the suit was wrongly dismissed on the ground that there was no cause of action, we reverse the order and direct that the suit be replaced on the file and proceeded with in regular course.

Ordered accordingly.

Original Jurisdicton

Madras Sessions November 4th, 1865. (*a*)

REG. at Prosecution of William DILLON SHALLARD *v.* JAMES WATKINS.

Criminal Jurisdiction of the High Court.

The defendant, a European British subject, was charged with having committed three offences at Bangalore punishable under the Penal Code.

Held, that the High Court has the same criminal jurisdiction which the late Supreme Court had, and that, Bangalore being within the territories of the Maharajah of Mysore, a Native Prince in alliance with the Government of Madras, the defendant was subject to the jurisdiction of the High Court in respect of criminal offences committed in the territory of Mysore.

1865. November 4.

THE defendant, a European British subject, was charged with having, on the 28th of September, 1865, at Bangalore, used criminal force to William Dillon Shallard, under Section 352 of the Penal Code. There were also charges under Sections 323 and 452, for inflicting hurt, and for trespass, after preparation to cause hurt. Plea, not guilty.

The *Acting Crown Prosecutor* and *R. Branson* appeared for the prosecution.

Miller, for the defendant.

The evidence for the prosecution having closed.

(*a*) Present: Scotland, C. J.

Miller said the High Court had no jurisdiction in this case. The criminal jurisdiction of the Court was founded upon the letters patent constituting the High Court. Section 21 conferred the same criminal jurisdiction upon the High Court both in respect of the local limits of its Original Civil Jurisdiction and of all persons beyond such limits which the late Supreme Court possessed. The provision of the late Supreme Court Charter applicable to this case was as follows:— 1865. *November* 4.

" And we do further authorize and empower the said Supreme Court of Judicature of Madras, in like manner, to inquire, hear, and determine and to award judgment and execution, of upon and against all treasons, murders, felonies, perjuries, crimes, extortions, misdemeanors, trespasses, wrongs, and oppressions, had, done, or committed, or which shall hereafter be had, done, or committed, by any of our subjects in any of the territories subject to, or dependent upon, the Government of Madras, or within any of the territories which now are or hereafter may be subject to or dependent upon the said Government or within any of the dominions of the Native Princes of India in alliance with the said Government." *(b).*

The Rajah of Mysore was not in alliance with the Government of Madras. The treaties were entered into by the Rajah with the East India Company, and contained no reference to the Government of Madras, nor did they mention that Government or show any stipulation or create any obligation binding upon the Madras Government. There being no alliance in the sense in which the word was used in the Charter, the Supreme Court had no jurisdiction. He referred to Reg. *v.* Bain, *(c).*

SCOTLAND, C. J.—Having reason to anticipate that this objection would be taken, I have given the point some consideration, so that I am able to express my clear opinion at once. By the operation of Section 21 of the Letters Patent constituting the High Court, the provisions in the Charter of the late Supreme Court still govern the criminal

(b) 3. Strange's Notes of Cases at Madras, 71.

(c) See Note (1) at the end of this case.

1865. November 4.

jurisdiction of the High Court, and clearly, I think, give jurisdiction in this case. The Court is empowered to try British subjects for offences committed within the factories subordinate to Fort St. Geoage or within territories subject to or dependent upon the Government of Madras " or within any of the dominions of the Native Princes of India in alliance with the said Government." This latter provision is, in my opinion, applicable to the present case. I may remark that similar words are not to be found in the earlier Charter of the Supreme Court of Calcutta, but are contained in the Charter of the Supreme Court of Bombay granted several years after that of Madras.

The present charge alleges an offence committed at Bangalore which is a part of the Mysore territory. Is Mysore, then, the territory of a Native Prince in alliance with the Government of Madras? A few observations will, I think, be sufficient to show that it is. Towards the close of the last century Mysore was in the Military possession of Hyder Ali and afterwards in that of Tippoo; but in 1799 Seringapatam fell and Tippoo was killed. Thereupon two treaties were made. One was called the Partition Treaty, the parties to which were the Governor General of India, the Peishwar, and the Nizam. By it the country was divided into four portions, but the share of territory given to the Peishwar he declined, and this was again divided between the East India Company and the Nizam. Mysore, the 4th division, was then constituted a central independent kingdom, and the present Maharajah, then an infant three years old, was placed on the Musnud. In the same year a subsidiary treaty was made between the Mahárája as an independent Sovereign and the Honorable East India Company, which is to be found in Mr. Aitchison's Valuable Collection of Treaties. It appears to have been entered into by the Governor General on behalf of the East India Company, and, when ratified, the Maharajah became a Sovereign Prince in alliance with the Company, and necessarily also with the Local Governments of the Presidencies. This is indisputable. But it is said that the words of the Charter of the Madras Supreme Court were intended to have a limited meaning and to apply only to the dominions of

Princes who contracted alliances with the Madras Government directly. I can see no good ground for such a construction. No doubt the Madras Government have been contracting parties to treaties and engagements with Native Princes, but only as representing and on behalf of the ruling power; and in 1800, when the Charter was granted, neither the Government of Madras nor that of Bomby had, save in the excepted case of sudden emergency and imminent danger, power to make treaties with Native Princes without the express authority of the Supreme Government in India or in England, and if made on an emergency, the Supreme Government were to be apprised of the fact and of the terms of the treaty at the earliest possible moment, in order to the ratification or rejection of such treaty. This was porovided by the 33rd Geo. III ch. 52, passed in 1793. It appears to me that a Native Prince in alliance with the East India Company (now Her Majesty the Queen) whether under a treaty contracted immediately with the Supreme Government in India, or mediately with the Governor in Council and ratified by the Supreme Government, must be considered as equally in alliance with the Madras Government within the meaning of the words of the Charter.

There is another point which I expected woud have been taken and most relied upon—and that is whether any thinghas occurred since the treaty of 1799 was entered into to alter the character of the Mahárája's political relationship as a Sovereign Prince in alliance with the Indian Government. Nothing certainly occurred till 1832. In that year the Government of India appear to have considered that the disordered state of the Mahárája's government and the reckless mal-administration and waste of the revenues of the country made it necessary to call upon the Mahárája to give over the administration of his territory, which he did; and from that time it has been and still is placed under a Commissioner and four Superintendents appointed by the Supreme Government in India. But this supercession was enforced avowedly, I believe, under the subsidiary treaty of 1799 which contains four stipulations more particularly bearing upon this subject. By those stipulations the East India Company undertook to supply troops and to protect the

1865. *November 4.*

Mahárája in his rights, in consideration of which the Mahárája stipulated that if the revenues should be endangered so as not to afford sufficient security for the payment of the subsidy agreed upon for maintaining the troops and other expenses mentioned in the treaty, the Governor General in Council might take over the administration of the Government or the management of any part of the territories. The supercession of the administrative Government of Mysore obviously did not deprive the Mahárája of his character of a Sovereign Prince. It was enforced as a treaty right, and the administration is carried on under the treaty for the purposes and benefit of the Mahárája's dominions exclusively; the treaty expressly providing for the rendering of a true and faithful account of the revenues. The Mahárája still continued a reigning Prince though under the terms of the treaty of alliance compelled to place the internal administration of his territories under the management of officers of the British Government: and the circumstance that those officers receive their appointment from Calcutta does not, I think, make any material difference.

The result is, that in my judgment Mysore is the territory of a Native Prince, in alliance with the Madras Government, and consequently the High Court has jurisdiction to try European British subjects for criminal offences committed within such territory. The objection therefore must be overruled. I may add that if it were necessary to go beyond the Supreme Court Charter, it would probably be found that jurisdiction is given by 33 Geo. III ch. 52, Sec. 67.

The defendant was convicted and sentenced to pay a fine of Rs. 1,200 and to be imprisoned for three days from the commencement of the Sessions.

Note.—(1) At the 3rd Madras Sessions of 1865, James Bain was convicted of having inflicted grievious hurt upon one Borah on the 11th June, 1865, at Mercara, in Coorg. Upon motion made in arrest of judgment on the ground that the High Court had no jurisdiction—it appeared by a Proclamation of the Governor General of India, dated 16th July 1835, that the Rajah of Coorg had been deposed and his territory annexed by the British Government. (*See Aitchison's Treaties and Sunnuds of India, Vol.* V. 178,) and that since that period the affairs of Coorg have been administered by the Government of Bengal. It was held that the High Court of Madras had no jurisdiction to try the case and the prisoner was ordered to be discharged.

Appellate Jurisdiction (a)

Referred Case No. 19 *of* 1865.

G. V. AGNEW *against* THE INDIAN CARRYING COMPANY.

A gratuitous agent is liable for any loss sustained by his principal through the gross negligence of the agent. What is gross negligence is a question on the facts of each particular case.

1865. *November* 6. *R. C. No.* 19 *of* 1865.

THIS was a case referred for the opinion of the High Court by Captain A. F. F. Bloomfield, the Judge of the Court of Small Causes at Trichinopoly.

No Counsel were instructed.

The Court delivered the following

JUDGMENT:—The question submitted for our decision in this case is, "whether the Indian Carrying Company as common carriers are bound to send goods by the cheapest route when delivering them beyond the limits of their own organized lines of transit, when no special agreement has been made with them."

Assuming that the defendant in this case is the gratuitous agent of the plaintiff, we answer that a gratuitous agent is not bound to undertake the agency, but that having undertaken it, he is liable for any loss sustained by his principal through his gross negligence. What is gross negligence is a question on the facts of each particular case.

We do not understand the question of contributory negligence to be referred to us.

(a) Present:—Holloway and Innes, J. J.

Appellate Jurisdiction (a)

Special Appeal No. 161 *of* 1865.

GURUSAMY AIYAN.................. ......*Special Appellant.*

SWAMINA'DHA AIYAN.........................*Special Respondent.*

Where land was sold on a condition of re-purchase and no time was mentioned in the instrument of sale. *Held*, that the sale had not become absolute, and that the plaintiff, having bought the original vendor's rights, was entitled to maintain a suit for recovery of the land.

1865. *November* 11. *S. A. No.* 161 *of* 1865.

THIS was a special appeal from the decision of V. Sundara Náidu, the Principal Sadr Amin of Tranquebar, in Regular Appeal No. 364 of 1863, reversing the decree of the Court of the District Munsif of Tiruvarúr in Original Suit No. 678 of 1861.

Srinivásachàriyár, for the special appellant, the plaintiff.

The Court delivered the following

JUDGMENT:—This is a suit to recover land sold on a condition of re-purchase. The first defendant claims under his father, the person bound by the condition.

The right of the plaintiff to recover depends on the construction of the agreement A. It specifies no time at which the sale should become absolute, and the sale has therefore not become absolute. If it had, of course the plaintiff could obtain no relief.

The Principal Sadr Amin has alluded to the former suit, but it does not really affect the question. There, the purchaser with a condition of redemption sued to get possession and did get possession of his purchase. But the validity of the condition was by no means involved, for there had been no tender, nor was the plea raised of a tender of the money, which might have justified the non-concession of the then plaintiff's legal rights. The supposed champerty

(a) Present:—Holloway and Innes, J, J.

is unworthy of notice, and it is clear that the plaintiff is entitled to sue having bought the original vendor's right subject to the incumbrance. 1865. *November* 11. *S. A. No.* 161 *of* 1865.

The decree of the Lower Appellate Court must be reversed with costs and that of the Munsif confirmed.

Appeal Allowed.

Appellate Jurisdiction (a)

Regular Appeal No. 45 *of* 1865.

Adanky Rámachandra Row, and subsequently A'diráju Venkata Row, Muktiyár on behalf of J. Young, Esq., Agent of Messrs. Arbuthnot and Co. ... *Appellant.* *Plaintiff.*

versus

Indukúri Appalaráju Gáru......*Respondent.* *Defendant.*

Penalty.—Liquidated damages.

Defendant agreed to supply 100 kantlams of jaggery by a specified date at 4½ Rupees per kantlam, and received 100 Rupees advance. Defendant further agreed that in default he would pay interest at 1 per cent. per mensem and *nafá* at 7 Rupees per Kantlam. No delivery was made by defendant.

In a suit by the plaintiff to recover 7 Rupees per kantlam and the interest. *Held,* that the amount sued for was in the nature of liquidated damages which plaintiff had a legal right to enforce, and not a penalty against which the Court would relieve.

The doctrines of the English and Roman Law upon the subject of penalties and liquidated damages examined.

THIS was a Regular Appeal against the decree of the Civil Court of Vizagapatam, in Original Suit No. 64 of 1863. 1865. *November* 13. *R. A. No.* 45 *of* 1865.

The Advocate General, for the appellant, the plaintiff.

Tirumalachàriyár, for the respondent, the defendant.

The Court delivered the following

JUDGMENT :—In this case the execution of the contract and its breach being admitted, and all the matters urged in defence having been overruled, and the defendant neither

(a) Present :—Frere and Holloway, J J.

1865. November 13. R. A. No. 45 of 1865.

having appealed nor appeared at the hearing of the present appeal, the only question for us to determine is, whether the learned Judge has correctly disallowed the sum claimed as *nafá* upon a set of written documents in the form following:—

"Whereas, after settling the value of jaggery required by you at 4½ Rupees per kantlam weighing 9 maunds, I have received (100) one hundred Rupees for supplying (100) one hundred kantlams through Gayatri Brambaji Pantulu, your head gumastah at Chandavaram, for making advances on account of the cultivation of sugar-cane in the ensuing Fasli 1269, and have thus contracted the hundred kantlams; I shall therefore pay interest on this sum at ½ Rupee per cent. per mensem from the commencement (this date) till the jaggery is delivered. I shall deliver the said jaggery in the Sugar Factory at Chittivalasa on or before the 30th Vaisákha Bahula of Siddhárdi, and after producing receipts take the usual rates, and in default I shall pay interest at 1 Rupee per cent. per mensem and *nafá* at 7 Rupees per kantlam. I shall at once pay to your manager Gudiwáda Lakshmi Narasimha Row, a commission at 2 Rupees per cent. For this my whole estate is pledged."

The learned Judge has refused to enforce this demand, because he considers it unconscientious and the reasoning of Story and Pothier preferable to that of the English Judges, among them Lords Eldon and Brougham, Barons Martin and Bramwell and Justice Erle.

He quotes with approbation a passage of Mr. Justice Story (§ 1316, Eq. Jur.) and applying it to the stipulation in the present case, he says:—

"Here is a plaintiff holding out to the defendant what to an improvident native ryot is the irresistible temptation of an advance to the full value of the crop to be delivered by him; at the same time the defendant is induced to stipulate, in case of his omission to deliver the jaggery, to pay a penalty which certainly would be an enormous loss to him; for besides returning the advances with the very abundant rate of interest of 12 per cent., he is to pay a further sum not far from double of the amount he received

as an advance. On the other hand, so far as has been shown, the plaintiff by recovering the sum advanced with the agreed interest recovers all that he has ever lost. If the sum fixed had been one from which it could reasonably have been inferred[1] that it was intended as a substitute for any difference between the contract price and the market price on the date fixed for delivery, the case would have been entirely different. But it was not pretended that it was intended to be any such thing, and indeed the word "nafá" shows that it was not so. As to the loose and slight evidence as to what was the market price of jaggery about the time when delivery became due, it is wholly undeserving of notice."

The foundation of the relief, therefore, is the strength of the temptation to enter into such a contract and the large amount of loss which he was to sustain by not fulfilling it. It must be observed that until legislation does that which in some cases it has wisely or unwisely done, make laws specially applicable to particular classes of persons, it cannot be contended that the class to which the contractor belongs is a legitimate element in the determination of the question.

As to the amount claimed, there are some most valuable observations of Lord Eldon in *Astley* v. *Weldon,* and whatever may have been the opinion in former times as to what should be the policy of the law as to relieving on account of the inequality of a contract, it cannot be contended that such is the policy where a man may lend money and contract for any amount of interest. If, instead of providing for the payment of double the stipulated price as profit, the contract had stipulated for the payment of 300 per cent. upon the advance, there can be no doubt that the Courts would have been bound to enforce it. Greatly accumulated force therefore the observation of Lord Eldon acquires as to the mischief of the Courts tampering with the agreements of the parties on account of the enormity of the damages provided for.

Act XXVIII of 1855 is a conclusive proof that the intention of the legislature is that parties shall be left to

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make and be compelled to stand by their own bargains. The case of usury is moreover an "experimentum crucis," for against this, both in the ancient and the modern world, legislation based upon a false political economy has most persistently fulminated with censures, disabilities, and penalties. The policy of the law is merely a vague expression for a principle sometimes derived from law, sometimes from politics and sometimes from ethics, which the judges of a particular country or a particular time think ought to be applied to a case never before provided for. The least objectionable mode, however, of determining this policy is by examining what the legislature has itself determined in similar cases. As in the time of Henry VIII, Sir Thomas Moore was perfectly correct in thinking that it was the policy of the law to protect debtors against their own bargains, inasmuch as it did so and punished the creditor in the most common class of contracts, so Erle C. J. and Martin and Bramwell, B. B. would be equally right in saying at the present day that the policy of the law is to keep every man to every contract not tainted with any vice which really affects its essence by impairing the freedom of will essential to every valid contract. That they do not do so arises from the statute of William still unrepealed, and the decisions upon it. That statute touching a special matter cannot, of course, be repealed on reasoning derived from other expressions of the legislative will.

Although, however, these learned judges are bound by the statute, its conflict with other and more recent expressions of the legislative will is a most important element in the inquiry, whether we ought to introduce it, with the doctrines which accompany it, into a country upon which it is not binding.

This, however, is a question which, in the present case, it is scarcely necessary to determine. We hardly know whether the learned Judge intended to decide that the *nafá* or profit here provided for was a penalty or liquidated damages. It seems, however, from the last two sentences of the above extract from his judgment that he does think it a stipulation for a penalty.

As to the English law upon the subject, we will quote from *Dimech v. Corlett*, the passage to which we referred during the argument (XII. Moo. P. C. 229). 1865. *November* 13. *R. A. No.* 45 *of* 1865.

"The law of this country on the question of penalty, or liquidated damages, may now be considered, after a great number of decisions, not perhaps all of them strictly reconcileable with each other, to be, however, at length satisfactorily settled, and the hinge on which the decision in every particular case turns, is the intention of the parties, to be collected from the language they have used. The mere use of the term "penalty" or the term "liquidated damages," does not determine that intention, but, like any other question of construction, it is to be determined by the nature of the provisions and the language of the whole instrument. One circumstance, however, is of great importance towards the arriving at a conclusion; if the instrument contains many stipulations of varying importance, or relating to objects of small value calculable in money, there is the strongest ground for supposing that a stipulation, applying generally to a breach of all, or any of them, was intended to be a penalty, and not in the way of liquidated damages. Now, when this charter-party is looked at, it will be found that it contains, as might be expected, many stipulations of greater or less inportance, the breach of any one of which, however minute, would, in one sense, be a non-performance of the agreement; it can hardly be supposed that the whole amount of the freight could be intended to be forfeited for any one breach, and the true sense seems to be that, for any minor breach, the damages to be recovered within the amount of freight are the damages actually sustained; though it is not inconsistent with this, that in case of an entire non-performance, such as a neglect or refusal to put any cargo on board, so that no freight could be earned, the parties had agreed that the damages should be the full amount of freight stipulated for in the instrument."

This passage is important both as a statement of the result of all the cases by a Court of the highest authority, certainly not attenuated by the mode in which it was composed on that occasion, and for a rule of construction, that although the stipulation may be held to be a penalty and

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therefore not payable upon a breach of any particular stipulation, the resulting damage from which was strictly measurable in money, still the penalty might properly be taken as the amount of damages measured by the parties themselves in case of an entire non-performance.

As to the law collectable from the late cases, it is almost needless to say that this case is a conclusive, as it is a most accurate statement. In *Sparrow v. Paris* (VII. Hurls. and Nor. 599) Bramwell B. says " It is a sum payable on one event. It is not a sum to secure the performance of several matters." *Kemble v. Farren,* illustrated in *Glasworthy v. Strutt* (1 Ex. 665), *Atkyns v. Kinnier* (IV. Ex. 776) and *Bettes v. Burch* (IV. Hurls. and Nor. 506), and all the subsequent cases, shew that the question is the intention of the parties, but that the rule of construction stated by the Privy Council has by a series of decisions been established, and it is accurately summed up by Baron Parke in *Atkyns v. Kinneya,* in which the learned Baron evidently doubted whether the law had not been stretched in establishing the rule.

The present contract consists of two separate sets of stipulations, one relating to the money advanced, which is in case of the non-performance of the contract to be repaid at 12 per cent., the ordinary rate of interest, and in case of performance, the defendant paid at 12 per cent., the ordinary rate of interest, and in case of performance, the defendant is to have the benefit of the loan at half the ordinary rate ; and the other, that in case of non-performance, nafá shall be paid at the rate of 7 rupees per kantlam.

The provision for producing receipts and the assessment of the amount of nafá, not as a gross sum, but upon each kantlam, seem to shew the intention ofthe parties that the entire contract might be performed by successive acts of delivery ; otherwise the object of the production of receipts is not clear. The distribution of the nafá too renders it clear that the defendant would only have been liable for so much as he should be found not to have delivered. This seems to us the proper construction, but at all events it is clear that in case of entire non-performance,

on the rule laid down by the Privy Council, there is nothing unreasonable in deciding upon this written contract that the intention of the parties was, that the increased, which is only the ordinary interest, and the 7 rupees per kantlam, should be the damages, measured by the parties themselves in case of breach. It seems to us that there is, on the construction of this document, no doubt that this was the intention of the parties, and we also think that in so interpreting the language, we are in perfect accordance with the decision of the Privy Council.

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As to the rule of calculating unliquidated damages, it seems to us that the only bearing of the decisions from *Hadley v. Baxendale* to the latest, *Borres v. Hutchinson* (XVIII. C. B. N. S. 445), is to shew the extremely nice and difficult questions which the measure of damages presents, and the extreme importance therefore that the parties should fix that measure at the period of making the contract. If, as there can be no doubt, a man can validly contract to pay a larger sum on non-payment of a smaller (Parke B. in *Glasworthy v. Strutt*), what is there unreasonable in permitting the parties to contract for the damages to be paid in case of breach of a contract to deliver goods? If they have so contracted, why should the purchaser be permitted to recover more than the sum stipulated for, and why should the vendor be permitted to shew that he ought to pay less? In the present case it seems to us that there can be no doubt that the parties have themselves calculated the damages to be paid upon an entire breach at 7 rupees per kantlam, and it seems to us that we are bound to keep the defendant to his contract, and that in so doing we are in complete accord with the English cases.

We will only cursorily remark upon the English Equity Cases. *Sloman v. Walter* and *Peachey v. Duke of Somerset* are set out in II. White and Tudor with all the subsequent cases. As to *Sloman v. Walter,* we may well ask with Sir D. Evans, how the penalty is to be efficacious in effecting its purpose, if the Courts are determined that it shall never be enforced? In *Roy v. Duke of Beaufort,* Lord Hardwicke made similar remarks and decided the case finally upon a ground certainly open to the severe comments of Sir D. Evans. The cases are, of course, conflicting. It

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might just as well have been said in *Ponsonby v. Adams* (II. B. P. C. 431), that the penalty was only collateral to compel the tenant to reside, and that therefore the landlord should only recover the proved damage. The argument, however, did not prevail. Tracing, too, the equity cases as to relief against forfeitures, it certainly does seem to us that the remarks of that great Judge, Lord Eldon, in *Hills v. Barclay*, are very well founded.

We may safely say that the tendency of Courts of Equity, as well as of Courts of Law, at the present day, is to interfere as little as possible with the expressed intention of the contracting parties.

The learned Judge has referred to the Roman Law upon this question, and certainly equity can be drawn from no purer spring. With all deference, however, to his opinion, the passage quoted (Inst. III. 16.7) is more consistent with a case of penalty than of liquidated damages according to the English authorities. There is a stipulation that several things shall be done and others left undone, and then the penal clause, "Si adversus ea factum erit, sive quide ita factum non erit, tunc pœnæ nomine decem aureos dare spondes?" "If anything is done contrary to what is agreed upon, or anything agreed upon is not done, then do you agree to give ten aurei by way of penalty." This is both a collateral agreement, and it provides for the payment in case of the omission of any one of a large number of things.

Mr. Justice Story in § 1317 says that the doctrine of Courts of Equity as to penalties and forfeitures is derived "from the Roman Law, where it is found regularly unfolded and sustained upon the clear principles of natural justice." The whole passage involves so strange a misconception that it will be better to quote it:

"It is not improbable that Courts of Equity adopted this doctrine of relief, in cases of penalties and forfeitures, from the Roman Law, where it is found regularly unfolded, and sustained upon the clear principles of natural justice. The Roman Law took notice, not only of conditions, strictly so called, but also of clauses of nullity and penal clauses,

The former were those, in which it was agreed, that a covenant should be null or void in a certain event; the latter were those where a penalty was added to a contract for non-performance of that which was stipulated. The general doctrine of that law was, that clauses of nullity and penal clauses were not to be executed according to the rigor of their terms. And, therefore, covenants were not of course dissolved, nor forfeitures or penalties positively incurred, if there was not a punctilious performance at the very time fixed by the contract. But the matter might be required to be submitted to the discretion of the proper judicial tribunal to decide upon it according to all the circumstances of the case and the nature and objects of the clauses. Indeed penalties were in that law treated altogether, as in reason and justice they ought to be, as a mere security for the performance of the principal obligation."

Now the plain meaning of this is, that every penal clause is to be treated, as Mr. Justice Story has already told us that it ought to be treated, "as a mere security for the performance of the principal obligation," that is, of course, that only the amount of damage actually proved can be recovered. If this is so, all the great Commentators upon the Civil Law have now for more than three centuries laboured under a very great misconception.

Donellus, in his Chapter "De eo quod interest in faciendi conventionibus,"—after giving many general rules as to the calculation of the amount and shewing the extreme uncertainty and the difficulty of proof—says, that the ancients have suggested that the best mode of avoiding these inconveniences is to add a penalty, that is, a certain sum of money which shall be agreed to be given if that is not done which has been agreed upon.—"Nam pœnæ quantitas semper certa est, ut navem facies, si non facies certum debis. Neque hic ulla extrinsecus incertitudo metuenda est ex eo, quod forte dicatur, stipulatoris pœnam petentis nihil interesse aut non tanti quantum pœna efficit. In pœnâ enim inquit Ulpianus, non spectatur an ejus intersit fieri id de quo prius comprehensum erat, sed quæ sit quantitas quæque conditio stipulationis."—"For the amount of the penalty is

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always certain, that you shall build a ship or pay ten aurei, nor is any extrinsic uncertainty to be feared from its being perhaps said, that the person seeking the penalty had no interest or not so much as the penalty secured; for in a penalty, says Ulpian, there is no regard to whether the doing of what has been agreed upon concerns him, but what is the quantity and what the condition of the stipulation. (Don. Com. lib. XV. Cap. IV. § 5.)

Donellus also quotes the very passage of the Institutes to which the Civil Judge has referred, as pointing out the difficulties and the most convenient way of solving them. It would be a very strange solution if the law always relieved against penalties and still remitted the parties to that enquiry, of which the stipulation was intended to avoid the necessity, "quantum interest?" The doctrine regularly unfolded in the Civil Law is, that a penalty so attached is recoverable. Domat, from whom Mr. Justice Story quotes, was well founded in saying that relief was given in the case quoted at Dig 45. IL 135. The case put to Scævola was a very strong one. Seia bought an estate as the agent of Titius. It was to be delivered to Titius if the money was paid before the Kalends of April. A part was paid but not all, but a very short time having elapsed, Titius offered to pay the remainder with interest, which Seia refused to receive. The answer was, that he could bring his action, " Si non multo post obtulisset nec mulieris quicquam propter eam moram interesset. " It is very probable that this is the parent of the doctrines of our Courts of Equity as to time not being of the essence of the contract, but how strong is this case and how carefully the prætor suggests relief.—Was the time long and did it, however short, make any difference to the woman? This is what the most learned of orators and the most eloquent of lawyears* says was submitted to the judgment of the tribunal, not as Mr. Justice Story construes it, that it was optional with the tribunal whether it could enforce penalties.

* Ut ego soleo dicere juris peritorum eloquentissimus eloquentium juris peritissimus., Cic. de Orat, Lib. I, Cap. 39.

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The *stipulatio pœnæ* or penal clause appeared in Roman Law first in the shape of a mere conditional convention, governed precisely by the rules which applied to all other conventions. It also appeared as an accessory convention (pactum adjectum), and its object was twofold, (1) to secure the performance of principal obligation,. (2) to discharge the creditor in case of non-performance from the burden of proving the existence and the amount of damage. If no time was fixed for performance the creditor could sue as soon as the obligation could have been executed and it was not always provided that the debtor could avoid the penalty by executing his contract before the " litis contestatio." If a time was fixed, the penalty could not be sued for before the period, but if it has passed without performance the liability is irrevocable. All that was required to make the penalty recoverable was a valid principal stipulation and the lapse of the time. So far therefore from *Sloman v. Walter* and its kindred cases being based upon the Roman Law, they are in direct antagonism to that law. So far from a penalty being void in the Roman Law when it has the collateral object of securing the performance of a valid principal obligation, it was always recoverable when that obligation was not fulfilled. The great Roman Lawyers knew nothing of the childish distinction between penalties and liquidated damages ; they considered the *stipulatio pœnæ*, when used as a *pactum adjectum*, as a fixation of the damages.

It is truly lamentable that the representations of Mr. Justice Story as to the Roman Law should be every where accepted as authoritative. It is useless and would be ostentatious to quote the *Corpus Juris* for the doctrines here laid down. Mackeldey quotes the principal laws at § 177, and the remarks here made have been taken from Maynz' Elements de Droit Romain, § 340, of which the very title is a curious comment upon Mr. Justice Story's doctrines,— " De quelques conventions accessoires ayant pour but d'assurer l'execution d' une obligation." This is a book which combines the German depth and accuracy of learning with the French clearness of exposition.

We find, therefore, that in Roman Law there could be no question whatever of the plaintiff's right to recover

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the sum disallowed. It seems clear to us also that the ... intention of the parties was to receive on the one side and pay on the other the sum secured in case of breach, and that at all events, as there is an entire breach, the sum ought on the principal of *Dimech v Corlett* to be awarded.

We have sufficiently indicated our opinion as to the policy of relieving parties from the effects of their own stipulations. That policy has been condemned by nearly every eminent judge who has had occasion to consider the subject, and arose at a period at which the views of the legislature were very different to what they now are. The judgment of the Civil Judge will be varied, and the costs of plaintiff below will be paid by defendant, but there will be no costs of the appeal in which defendant has not appeared.

Original Jurisdicton (a)

Regular Appeal No. 35 *of* 1865.

JIVANI BHAI.....................................*Plaintiff.*

JIVU BHAI.....................................*Respondent.*

Plaintiff sued as the widow of an adopted son for the property of the adoptive father, and also on the ground that the adopted son was the devisee of the adoptive father. The Civil Judge decided that the adoption of the plaintiff's husband was invalid according to Hindu Law, and that the devise, having been made to the plaintiff's husband as adopted son, was invalid. *Held*, (reversing the decision of the Civil Judge) that as the language of the testator sufficiently indicated the person who was to be the object of his bounty, the person so indicated was entitled to take, although the testator conceived him to possess a character which in point of law cannot be sustained.

Semble. The adoption of the son of a person with whom the adopter could not have intermarried is invalid according to Hindu Law.

1865. November 18. R. A. No. 35 of 1965.

THIS was a regular appeal against the decree of the Civil Court of Mangalore, in Original Suit No. 4 of 1863.

The Advocate General and *Tirumálachárydr,* for the appellant, the plaintiff.

(a) Present : Frere and Holloway, J. J.

Miller and *Srinivasacháryár*, for the respondent, the defendant.

1865. November 18. R. A. No. 35 of 1865.

The Court delivered the following

JUDGMENT:—This was a suit to recover from one Jivu Bhái, daughter of one Krishna Row, deceased, the property of Krishna Row. The plaintiff claimed on the ground that she was the widow of Narasinga Row, the adopted son of Krishna Row, and also on the ground that her deceased husband was the devisee of all the property of Krishna Row by a will dated 26th November, 1845.

Defendant answered that plaintiff is not entitled, that the adoption of Narasinga Row, her son, by her father, Krishna Row, is altogether illegal, and that the will can have no force or effect, and for this she quotes Mr. Justice Strange's Hindu Law.

The Civil Judge observed that the pandits had declared the adoption of a daughter's son altogether invalid; that there was, moreover, ample authority for this position; that as to the claim under the will the bequest was to Narasinga Row, as adopted son, and it can have no effect when he is found not to be so.

In the argument before this Court it was admitted by the Counsel for the respondent that it was impossible for him to dispute that the ceremony of adoption was performed, and that, if the adoption of a daughter's son is valid, there was a valid adoption, and that the document called a will was executed by Krishna Row.

The only questions for determination, therefore, are; what interest, if any, Narasinga Row took under the document dated 26th November, 1845, and whether that interest, if any, has passed to his widow, the plaintiff? Whether the adoption of Narasinga Row was valid?

We may at once say that the grounds upon which the Civil Judge has disallowed the plaintiff's claim under the document of 1845 are unsustainable. If the language

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of the testator sufficiently indicates the person who is to be the object of his bounty, the person so indicated will not be prevented from taking because the testator conceived him to possess a character which in point of law cannot be sustained. The authorities for persons taking as "personæ designatæ," even in opposition to an established rule of construction of the words used, are very numerous. It is unnecessary to enlarge upon this subordinate rule, which is only a particular example of the more general rule that the construction of all written instruments is to be such as will effectuate the expressed intent of the author of the instrument. The whole language of this document leaves no doubt as to the person described throughout as Narasinga Row. He is described as son of his daughter, the defendant, whom he had adopted with the consent of his parents. There is really no dispute upon this matter, and the person to take being sufficiently indicated he will be entitled to any benefits which, on the true construction of this document, the testator intended him to take. That the testator can disinherit both widow and daughter by a testamentary disposition is the exact point decided by the Privy Council and by the leading case in this Court.

The question is somewhat complicated by the fact that Narasinga Row died in the life-time of Bhagirathi Bhai, the widow of Krishna Row, who by the statement in the plaint enjoyed the property until her death in 1857, three years after that of Narasinga Row. To determine, therefore, whether the present plaintiff can take anything through this will, it is necessary to see whether any thing was, by virtue of it, vested in Narasinga Row at his death.

Two constructions have been proposed by the Counsel for the respondent. (1) That the document vested the whole estate in Bhagirathi Bhái and Narasinga Row as joint tenants, and that Bhagirathi Bhái took therefore the whole by survivorship. (2) That Narasinga Row took nothing under the will unless he survived Bhagirathi Bhái. For the appellants it was contended that the estate vested in Narasinga Row by virtue of the will, and that nothing

more existed than a precept that he should listen to the precepts of Bhagirathi Bhái, but that even if it could be said that she took a life-estate, there was, at all events, an estate vested in Narasinga Row to which the widow had a right to succeed.

The document is very inartificial and one word constantly used throughout it, "Swatantrita," may mean either management or ownership, and in itself really is not conclusive as to whether an estate is to be given by the vesting of the quality described by this word or merely a right of ownership.

The first clause is a key to the subsequent provisions. It recites the adoption and states that the following arrangements are made on account of the boy being only 7 or 8 years old. The second recites that he will enjoy and manage during his life, and that, after his death, all the power will belong to Bhagirathi and Narasinga Row. It then involves the two cases of Narasinga Row being of age and competent to manage at his death, and of his nonage and incompetency. If competent, he is to manage with due deference to her. If incompetent, she is to manage it without waste. She may appoint an agent to manage, unless he has himself done so, but even then she is to retain the whole property and possession.

It seems impossible not to conclude that these words are intended to provide for the case of nonage, for it then goes on to say that he is to listen to Bhagirathi as to the management, even if he be of age, and not act on his own will. He then provides that the documents are to be executed in the name of Bhagirathi, and on her death in the name of Narasinga Row, or they may be passed in the name of both. Here, the provision for the mode of execution of the documents seems intended to secure the exercise of the wife's power of control. They can scarcely be said to furnish any guide to the nature of the interest to be vested. As to this they are quite neutral. It is, moreover, no uncommon thing for family agreements, in the country

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in which this Sheristadar spent a great portion of his official life, to check lavish expenditure by requiring the signature of some person not the actual manager of property to documents passing family property.

Clause 3 favors the construction that management only is provided for. It vests the management in Bhagirathi until the arrival of Narasinga Row at years of discretion. She is to manage with great economy and so as to "have the property secured from dissipation so as to be beneficial to Narasinga Row." We have, here, what appears to us a clear indication that the beneficial interest is in Narasinga Row, and that the object of all the provisions for management, appointment of agents, &c., is the securing to him of that beneficial interest.

The other clauses, until we come to the conclusion, have little bearing upon the question. He there sums up the provisions having mainly reference to the management of the property. He is to have the power during his life, she after his death ;—but it is clear from the words which immediately follow that Narasinga Row is to manage under the instructions of Bhagirathi during her life, and she is to take steps for the boy's proper support, aud for the estate vesting unwasted in him.

Taking first the language of these provisions, it seems to us that an estate is clearly vested by them in Narasinga Row, that all the provisions which have reference to Bhagirathi are simply directed to the duties of management which are to be subordinate to the main purpose, that of protecting the beneficial interest for the son. It seems to us that there are no words which could lead to the conclusion that the vesting of the beneficial interest, clearly given, was to be suspended, either during the life of Bhagirathi or for any other period, and we can find no words giving an estate to her ; on the contrary they all provide for her not dissipating any portion of the capital. If it was intended that she should take for life and he only if he survived her, it would be impossible to explain the constant reference to

the management by him on his attaining years of discretion. Nor do we think that there is any foundation for an argument that his taking at all was dependent upon his reaching the age of discretion. There are words amply sufficient to give him a vested estate and there are none, as it seems to us, to suspend that vesting. When we look too at the circumstances of the testator, believing, as he did, that he had affiliated the boy, and the recital that he makes this arrangement on account of his tender age, great aid is given to the construction which we should, from the language alone, have put upon these provisions. We are unable to see the least colour for the argument that the words have created a joint tenancy. There are really no words whatever to give an estate to two without words of severance. Supposing, however, that the words were susceptible of the construction that there was a life-estate to Bhagirathi with a gift of it after her death to Narasinga Row, *Rewán Prasád v. Mussuma Rádha Bhibhi* (IV Mo. I. A. 137), to which we referred during the argument, is a distinct authority that the death of the husband, during the pendency of the life-estate, would not prevent Narasinga Row from taking a vested interest, the actual enjoyment being suspended until the death of Bhagirathi. It is also a distinct authority that the widow will take the property so vested, although the actual possession of the husband was postponed.

It is clear to us, therefore, that the whole estate of Krishna Row passed to Narasinga Row under this will and that his widow is entitled to recover it.

It is unnecessary, therefore, to discuss the second point upon which the plaintiff's claim was based. To avoid misapprehension, it is, however, necessary to state that we do not consider the question settled by the case at IX Moore's I. Ap. 506, because, in the first place, the parties in that case are clearly Sudras and not Vaisyas, and in the second, the judgment of the Privy Council upon a point never raised in the Court below, as indeed it could not have been raised, went upon admissions of the appellant's father, who would have been acquainted with Hindu laws and customs and

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have been aware of the legal invalidity of the adoption if there had been any. On the point of the validity of the adoption of the son of a person with whom the adopter could not have intermarried, there will be found great conflict of opinion among the pandits, but none whatever upon the authorities. They are all perfectly consistent in declaring such adoptions invalid. It will perhaps be found that the allegation of custom in this case will be found to amount simply to an allegation that people do that which the law has forbidden.

Appellate Jurisdiction (a)

Referred Case No. 20 *of* 1865.

RAMASAMY CHETTY against VENKATACHELLAPATY CHETTY.

The operation of the Limitation Act is not suspended during the recess of the Court.

1865. November 20. R. C. No. 20 of 1865.

THIS was a case referred for the opinion of the High Court by F. M. Kindersley, the Acting Judge of the Court of Small Causes at Combaconum.

No Counsel were instructed.

The Court delivered the following

JUDGMENT :—This is a suit upon a money bond. The period of limitation expired when the Small Cause Court was closed for the vacation and the suit was filed on the day on which the Court re-opened. The Acting Judge dismissed the suit subject to our opinion whether the operation of the Limitation Act was suspended during the Court's recess.

We are clearly of opinion that the operation of the Act of Limitations in this case was not in any way affected by the adjournment of the Court of Small Causes, and consequently that the Judge rightly decided that the suit was barred by lapse of time.

(a) Present: Scotland, C. J. and Frere, J.

Appellate Jurisdiction (a)

Referred Case No. 23 of 1865.

ANANTHA NARAIYANAPPAIYAN, *alias* ASVATA AIYAN *against* GANAPATY AIYAN and 3 others.

Where a suit was brought for interest amounting to less than Rs. 500, due upon a bond for Rs. 1,000, not yet payaple. *Held*, that a Court of Small Causes has jurisdiction to try the case, the plaintiff having had a separate and complete cause of action upon the bond entitling him to recover the annual interest as it accrued due.

The fact that forgery of the bond is set up as a defence makes no difference.

THIS was a case referred for the opinion of the High Court by F. M. Kindersley, the Acting Judge of the Court of Small Causes at Combaconum.

1865. *November* 20. *R. A. No.* 23 *of* 1865.

No Counsel were instructed.

The Court delivered the following

JUDGMENT:—This is a suit for interest due upon a bond. The principal, which amounts to Rupees 1,000, will not become due till March, 1866. The interest now claimed is less than Rupess 500.

The question submitted for our determination is, whether the Court of Small Causes has jurisdiction; (1) if the genuineness of the bond be denied; (2) if it be admitted.

Assuming the bond to be a genuine instrument, the defendants' liability as to the payment of interest is quite distinct from their liability to repay the principal sum. The plaintiff had a separate and complete cause of action on the bond entitling him to recover the annual interest as it accrued, due, and as the amount in arrear does not exceed 500 Rupees, we are of opinion that his claim for interest is cognizable by a Court of Small Causes.

The circumstance that forgery of the bond is set up as a defence to the suit, we think, makes no difference as respects the question of jurisdiction. Our answer, therefore, to the case submitted is that the Combaconum Court of Small Causes has jurisdiction to hear and determine the suit.

(a) Present: Scotland, C. J. and Frere, J.

Appellate Jurisdiction (a)

Regular Appeal No. 53 *of* 1865.

NATTAM VENKATARATNUM *alias* BALLAKONDA VENKATA NARAYANA ROW. } *Appellant.*

NATTAM RAMAIYA *alias* BALAKONDA RAMA ROW, and 4 others. } *Respondents.*

In a suit for division of a village between members of the same family, the defendant alleged that a former division relied upon by the plaintiff was merely nominal and never intended to be carried out, and also that the village was in 1836 granted to his father for his sole use, and both those allegations were found against defendant who appealed on the ground that the village, which is an inam, was granted to defendant for his sole use in 1857 on the death of his father. *Held*, that the grant to defendant was not a new grant and was subject to the rights of the other members of the family.

Per—INNES, J.—The defendant not having been prejudiced by the circumstance that no issue was framed upon the question whether a fresh grant was made to defendants, the decision of the Lower Court ought to be confirmed.

1865. *November* 23. *R. A. No.* 53 *of* 1865.

THIS was a regular appeal from the decree of C. Collett, the Civil Judge of Vizagapatam, in Original Suit No. 61 of 1868.

Sloan, for the appellant, the first defendant.

The Court delivered the following judgment.

FRERE, J.—This was a suit for division of a village between members of the same family. The grounds upon which the claim is based are fully stated in the judgment of the Civil Judge under date 20th February 1865.

The Civil Judge decreed to plaintiff's five-sixths of the village in question. He found on the evidence in the case that a division deed had been actually executed between the members of the family in the year 1831, and that the proceeds of the village had been thus distributed annually until 1859.

The defendant has now appealed against this judgment, on the ground that the defendant's father was the sole proprietor of the village, which is a registered inam.

I am clearly for affirming the decree of the Civil Judge in this case. In the original suit the defendant rested his case on the alleged fact that the deed of division in 1831 was merely of a nominal character and was never intended to be carried out, and that in the year 1836 the village was expressly granted to the defendant's father only for his sole use and benefit. Both these issues have been decided by the Civil Judge in favor of the plaintiffs and against the defendant, and the correctness of these findings has not been disputed by the vakeel for the defendant in appeal; but the defendant now shifts his ground, and bases his claim to exclude the plaintiffs on the ground that by the Minutes of Consultation, dated 20th June, 1857, the Inam was granted to defendant on the death of his father for his own life. No fresh sannad or grant, however, was issued, and these orders therefore could only have the effect of continuing the Inams in the name of defendant, the head of the family, in the same manner as the defendant's father appears previously to have held them as the registered Inamdar, although, as the Civil Judge has shewn in para 3 of his judgment, the plaintiffs at the same time shared the usufruct. The fact therefore of the continuance of the grant in the name of the defendant could in no way affect the rights of the plaintiffs, founded on the ordinary principles of Hindu Law. I would affirm the decree of the Civil Judge and dismiss this appeal with costs.

INNES, J.—I concur in the conclusion arrived at by Mr. Justice Frere that we ought to confirm the decree of the Civil Judge. I think, however, (in this differing from him) that the question of a fresh grant in 1857 was raised by defendant in para. 5, and in the concluding part of para. 10 at the end of the answer. No issue upon this point was recorded by the Judge, and, if the defendant would be in any way prejudiced by this omission, I should be of opinion that an issue ought to be sent for trial. I find, however, from the Minutes of Consultation that the grants 11, 14, 15 and 16 embracing the lands concerned in this suit were not *resumed* by Government, and consequently no new grants of them could have been made; they were merely allowed to continue in the possession of the present holder for life.

1865. November 23. R. A. No. 53 of 1865.

Had they been resumed and re-granted, though without a sannad, I should have considered that all former rights were extinguished, and that the property belonged exclusively to first defendant. The sannad in such cases, I think, is mere evidence of the grant and not the grant itself. No new grant having been made, first defendant cannot be prejudiced by the circumstance of no issue having been recorded on this point. I would confirm the decree.

Appeal dismissed.

Appellate Jurisdiction (a)

Referred Case No. 26 *of* 1865.

HEMPAMMAL *against* HANUMAN and another.

In a suit for the recovery of money lent upon an agreement that it shall be payable upon demand. *Held*, that the Statute of Limitations begins to run from the date of the loan.

1865. November 27. R. C. No 26 of 1865.

THIS was a case referred for the opinion of the High Court by T. Ganapaty, the Acting District Munsif of the Court of Small Causes at Oosoor.

No Counsel were instructed.

The Court delivered the following

JUDGMENT:—The question put is substantially, whether the statute of limitations in a case for the recovery of money lent on an agreement that it shall be payable on demand, runs from the period of the loan or from that of the demand.

The debt constitutes the cause of action and arises instantly upon the loan, and the date of the loan is the date from which the statute runs. This was decided in England on a note promising to pay money lent on demand (II. Mee. and Wels., 461, *Norton v. Ellam.*)

Our answer therefore is, that the action was clearly barred.

(a) Present: Holloway and Innes, JJ.

Appellate Jurisdiction (a)

Criminal Petition No. 169 *of* 1865.

WILLIAM MARTIN EVANS and 2 others, prisoners.

The Sessions Court has jurisdiction to hear appeals from the sentences of a Justice of the Peace acting under the Merchant Seamen's Act (No. 1 of 1859.)

1865. *December* 2. *C. P. No.* 169 *of* 1865.

THIS was a petition against an order of A. W. Sullivan, the Session Judge of Tellicherry, declining to receive an appeal from the sentence passed by a Justice of the Peace.

JUDGMENT:—Assuming that the statement of petitioners, that the Session Judge has refused to hear the appeal of prisoners on the sole ground that he has no jurisdiction to hear appeals from sentences under the Merchant Seamen's Act, is well founded, we are of opinion that the Judge is in error.

The Act (1 of 1859) makes the offence triable by a Magistrate.

Section 21 of the Criminal Procedure Code gives jurisdiction to all the tribunals mentioned to investigate all cases within the powers of punishment given by this Code, whether the offence is made punishable by the Code or by some special or local law not specifying any authority by which such offence is to be adjudicated upon.

This section gives the Magistrate the power to try and would have done so if the Merchant Seamen's Act had not. Then Section 409 gives a right of appeal to the Court of Session from such conviction. It seems therefore clear that the Session Court has jurisdiction to entertain such appeals.

Ordered accordingly that a copy of this judgment be forwarded to the appellants through the Session Judge.

(a) Present :—Holloway and Innes, JJ.

Appellate Jurisdiction (a)

Referred Case No. 27 *of* 1865.

APPAVU PILLAI *against* SUBRAYA MUPPEN and another.

Plaintiff sued for recovery of a sum of money lent upon the pledge of personal property and that the moveable property pledged may be declared liable. *Held*, that a Small Cause Court has jurisdiction to entertain a suit to enforce a contract pledging moveable property.

1865. December 11. *R. C. No. 27 of* 1865.

THIS was a case referred for the opinion of the High Court by F. M. Kindersley, the Acting Judge of the Court of Small Causes at Combaconum.

No Counsel were instructed.

The Court delivered the following

JUDGMENT:—In this case the plaintiff sued for the recovery of a sum of money lent upon the pledge of certain personal property, and that the moveable property pledged may be declared liable for the amount.

The Judge at first rejected the plaint, but on further consideration he has received it, subject to the opinion of the High Court, whether the plaintiff ought not to be compelled to abandon his claim upon the personal property, before suing in the Small Cause Court?

We answer that there is nothing, in our opinion in the Small Cause Court Act to prevent the pledgee enforcing his security on moveable property. The Court, having jurisdiction in a suit for the recovery of such property, has clearly jurisdiction to enforce a contract pledging such property.

The case to which the Judge refers was a suit for a balance on an account verbally stated, and the passage quoted from the judgment was calculated to mislead the Judge upon the present matter. It was however inserted to protect the plaintiff's right of lien, if, in a suit by the defendant for the recovery of his jewels, the plaintiff should

(a) Present: Scotland, C. J. and Holloway, J.

assert that right, which would exist in all its entirety although the suit for the money was barred by the statute. That case was not one by the pledgee for the enforcement of his pledge on moveable property, but simply for the recovery of money from the defendant who had the correlated right of receiving back the jewels pledged. 1866. December 11. R. C. No. 27 of 1865.

Having decided that the Small Cause Court has jurisdiction to enforce a contract pledging moveable property, it is unnecessary to answer the precise question put by the judge. We may however observe that even if there was no jurisdiction to enforce the entire contract, if a plaintiff was entitled to sue for money lent and prayed simply the recovery of the debt, there would be no reason whatever for refusing him the relief sought, because there were other terms of the contract not within the jurisdiction of the Small Cause Court. Whether the recovery or failure to recover in the Small Cause Court would bar his right to enforce the other terms of the contract in a Court having jurisdiction over them, would be a question for that Court and not for the Small Cause Court.

Appellate Jurisdiction (a)

Referred Case No. 25 *of* 1865.

SRI RA'JA UPPALAPA'TI GANAKAYA GARU *against* BA'LAVI' RA'MUDU.

A case decided by a Collector under Regulation V of 1822 from whose decision no appeal was made is *res judicata*, and cannot be re-opened before a Small Cause Court Judge.

Adimulan Pillai v. Kovil Chinna Pillai (2 Madras High Court Reports, 22), observed upon and doubted.

CASE referred for the opinion of the High Court by S. Rangiah, the District Munsif of Rajahmundry. 1865. December 11. R. C. No. 25 of 1865.

Miller, for the plaintiff.

Sloan, for the defendant.

(a) Present: Scotland, C. J. and Holloway, J.

1865. December 11. R. C. No. 25 of 1865.

JUDGMENT:—The question referred is whether a suit can be brought in a Small Cause Court on a matter already determined by a Collector under Regulation V of 1822. This question divides itself into two subordinate questions.

I. Is the matter once determined by the Collector *res judicata*, and is a second suit for the same matter therefore unsustainable?

II. Even if there has been no application to the Collector, is the jurisdiction of the Small Cause Court barred by Section VI, Act XI of 1865.

It is quite clear to us that the suit before the Small Cause Court is not sustainable upon the first ground—Jurisdiction having been given to the Collector to determine the case by summary proceeding and a Regular Appeal from his decision being provided, it is quite clear that no second action can be brought upon the matter once determined by the Collector.

It is unnecessary therefore to answer the second question, but we may observe that when the case at 2 High Court Reports 22 was decided, the Court did not advert to the fact that in clauses 2 and 8 of Section I, of the Limitation Act, suits before the Collector are expressly recited to be summary suits. Had these provisions been adverted to, they probably would have had great influence upon the decision of the question, and we are inclined to think that it would have been otherwise decided.

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One clause of the agreement, literally translated, was in these words:—"To the married wives of both of us if there is no male offspring in the event of there being sons not born in wedlock must divide into equal shares for their own benefit." Upon the construction of this clause:

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One clause of the agreement, literally translated, was in these words :—" To the married wives of both of us if there is not male offspring in the event of there being sons not born in wedlock, must divide into equal shares for their own benefit." Upon the construction of this clause :

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Held, that the grant to defendant was not a new grant and was subject to the rights of the other members of the family.

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The cargo was loaded accordingly, a bill of lading was given for the same, and the ship sailed from Cardiff on the 8th October 1863. M. having consigned the cargo to A. & Co., who carried on business at Madras. On the same day the owners drew a bill on M. at three months for £261. 1*s*. 10*d*. being one-third of the freight.

On the 10th October 1863, the general Agents in London of A. and Co. advanced to M. on A. and Co's account and out of their funds £700, received as security for such advance, the bill of lading blank-endorsed and forwarded the same bill to A. & Co.

On the 29th October 1863, M. accepted the bill for £ 261. 1*s*. 10*d*; and in the following December he suspended payment and the bill was protested.

On the 14th January 1864 the ship arrived at Madras and thereupon A. and Co., as holders of the bill of lading, applied for the delivery of the cargo and offered to advance the £150 in cash pursuant to the charter-party, but the Captain claimed to retain the cargo for the value of the dishonoured bill and the balance of freight due.

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In 1851 another co-owner had, in a suit to which some only of the present defendants were parties, obtained a decree for the periodical allotment of the lands, and in 1853 such decree, which clearly recognised the existence and validity of the custom, was affirmed on appeal.

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This signature need not be formally subjoined or added to an acknowledgment written by the debtor, unless it appears from the writing that such signature was intended, or unless the writing would be incomplete in itself as an admission without a signature.

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In 1851 another co-owner had, in a suit to which some only of the present defendants were parties, obtained a decree for the periodical allotment of the lands, and in 1853 such decree, which clearly recognised the existence and validity of the custom, was affirmed on appeal.

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A consent by a Vakil of the party to a decree being made binding property other than what the parties to the suit may have an interest in is a consent to what is beyond the scope of the suit and could be neither binding on the party nor acted upon by the Court. 423

See CAUSE OF ACTION.

VALUABLE SECURITY.

A settlement of accounts in writing though not signed by any person, is a "valuable security" within the definition of Section 30 of the Indian Penal Code...... 247

VENDOR AND PURCHASER.

Where A sold land to B reserving a right to re-purchase by payment of a certain sum at a specified time, and before such time had arrived, B resold to C for valuable consideration without notice and A failed to make the payment and forfeited his right to re-purchase.

Held, that he had no title unless relieved against the forfeiture, and that such relief could not be given as against C.................................. 14

Where a purchaser of immoveable property deals with a person having a qualified power of dealing with that property, it lies upon the purchaser to give some reasonable account of the need which actually existed, or

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was alleged to exist, for the sale........................... 407

Where land was sold on a condition of re-purchase and no time was mentioned in the instrument of sale:—

Held, that the sale had not become absolute, and that the plaintiff, having bought the original vendor's rights, was entitled to maintain a suit for recovery of the land. 450

A sale by a father is valid by Hindú Law to the extent of his own share of the undivided state. There is no distinction according to the Madras School between a father and other co-parceners........................... 416

See Widow.

WARD.

See Guardian and Ward.

WIDOW.

A Hindú Widow's right to succeed to her husband's ancestral undivided property is only as his immediate heir.

A Widow can only inherit family property where there has been a partition among the co-parceners of whom her husband was one, or where the whole property has vested in her husband by the death of all the other co-parceners.

The widow of an undivided Hindú who leaves a co-parcener him surviving, has, like the widow of a divided Hindú who leaves male issue, merely a right to maintenance.

Where, therefore, a widow sued for a Pálaiyappattu as heir to the surviving brother of her husband:—

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Held, that the suit must be dismissed.................... 117

A widow can adopt a son without the consent of her husband according to Hindú Law.

Where a widow adopted a son with the assent of the majority of the surviving kindred of her husband, the adoption was held to be valid.

In such a case if the requirment of the consent of the Sapindas be anything more than a moral precept, the assent of any one of the Sapindas will suffice......... 206

Where a widow sued to recover from the brothers of her deceased husband a share of property which remained undivided at his death, a division of part of the family property having taken place during the life-time of the husband.

Held, that the plaintiff had no right to recover the property which was actually undivided at the death of her husband.......................... 325

A sale by a widow of property derived from her husband, who is divided in interest from his own family, is valid for her life. Such a sale will not be set aside at the instance of a divided brother of the husband...... 393

There is no rule of Hindú Law which recognises any authority in a widow entitled only to maintenance to make contracts for necessary supplies binding upon the heir in possession of the family property and liable to maintain her............... 409

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Plaintiff sued as the widow of an adopted son for the property of the adoptive father and also on the ground that the adopted son was the devisee of the adoptive father. The Civil Judge decided that the adoption of the plaintiff's husband was invalid according to Hindu Law, and that the devise, having been made to the plaintiff's husband as adopted son, was invalid.

Held (reversing the decision of the Civil Judge) that as the language of the testator sufficiently indicated the person who was to be the object of his bounty, the person so indicated was entitled to take, although the testator conceived him to possess a character which in point of law cannot be sustained 462

See DECREE.

WIFE.

A married woman is capable of contracting in respect of her separate estate.

The doctrines of the Roman and English law upon the subject examined............ 383

See ABSENCE.

WILL.

A Hindú may make a nuncupative will of property whether immoveable or moveable 37

T. claimed a Zamíndárí as the representative of a devisee under a will. In 1845 A, one of the Zamíndár's widows, had sued T's father for the Zamíndárí, and he, in his answer, had set up the will. In 1856, K, the Zamíndár's second daughter and A's successor, according to Hindú law had sued T's guardian for the Zamíndárí, and he, in his rejoinder, also relied on the will. Both suits were decided against the plaintiff, but in one the parties were restricted to evidence on a point which was raised as to division, and in the other no points nor issues were settled. On an appeal by K. to the Privy Council against the decrees of 1845 and 1856, the will was not relied on, because as such it was considered and admitted to be untenable, and the Privy Council decided against T, reversing the former decrees. T. now sued K. for the Zamíndárí grounding his claim on the will. The Civil Judge rejected his plaint under Act VIII of 1859, Section 2.

Held, on regular appeal, that although the Privy Council had given no direct decision upon the will, their judgment and final order involved the decision of all claim of title under that will, and must be considered, as between the parties, tantamount to an express adjudication upon such claim ... 131

See WIDOW.

WITNESS.

Where a witness was at the beginning of the day solemnly affirmed once for all to speak the truth in all the cases coming before the Court that day :—

Held, that he might be convicted, under Sec. 193 of the Penal Code, of giving false evidence in a suit which

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came on that day, although he was not affirmed to speak the truth in that suit after it was called on for hearing, and the names of the cases in the day's list were not mentioned when the affirmation was administered... 43

WRITING.

No transaction of Hindú Law absolutely requires a writing 37

Part-payment, though evidenced by writing, is not in itself an admission of debt within Sec. 4 of Act XIV of 1859.

To entitle a plaintiff to the benefit of a new period of limitation under that Section he must prove that the party sued has in writing authenticated by his signature, either in express terms or by reasonable construction, acknowledged and admitted that the debt or a part thereof is due from him.

This signature need not be formally subjoined or added to an acknowledgment written by the debtor, unless it appears from the writing that such signature was intended, or unless the writing would be incomplete in itself as an admission without a signature.

If the body of the admission is in the debtor's own handwriting and contains his signature and was given over by him as complete in itself, it would be an acknowledgment in writing within the meaning of Section 4........................ 79

ZAMI'NDA'R.

A Zamíndárí was attached in 1827, and the Collector, without authority from the Board of Revenue or the Government, remitted a portion of the tirvai and continued such remissions until 1842, when the Zamindárí was restored. The then Zamíndár and his successors continued the remissions always, however, entering the faisal rates in the pattas and setting down the remission as munásib.

In 1861 the plaintiff became lessee of the Zamíndárí, and in 1862, pursuant to notice, he tendered pattas for faslí 1272 to the defendant and the ryots at the faisal rates.

Held:—First, that the plaintiff was not precluded from raising the rents to the amount of the faisal assessment.

Secondly, that the Act of Limitations did not apply; and thirdly, that the plaintiff might sue in a Court of Small Causes for the rent for fasli 1272..................... 22

A Zamíndár's estate is analogous to an estate tail as it originally stood upon the statute *De Donis*.

The Zamíndár is the owner of the Zamíndárí, but can neither incumber nor alienate beyond the period of his own life 128

See WILL.